CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 23

WILSON AND CO., INC., PETITIONER,

vs.

THE UNITED STATES

No. 24

WILSON & CO., INC., OF KANSAS, PETITIONER,

vs.

THE UNITED STATES

No. 25

T. M. SINCLAIR & COMPANY, LIMITED, PETITIONER

vs.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 1, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 778

WILSON AND CO., INC., PETITIONER,

vs.

THE UNITED STATES

No. 779

WILSON & CO., INC., OF KANSAS, PETITIONER,

vs.

THE UNITED STATES

No. 780

T. M. SINCLAIR & COMPANY, LIMITED, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

INDEX.

	Original	Print
Record from Court of Claims	1	1
Petition (Wilson & Co., Inc.)	1	1
Exhibit "A"—Schedule of claims for refund of taxes (omitted in printing)	7	
Petition (Wilson & Co., Inc., of Kansas)	81	4
Exhibit "A"—Schedule of claims for refund of taxes (omitted in printing)	87	

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—6619

	Original	Print
Record from Court of Claims—Continued.		
Petition (T. M. Sinclair & Co., Ltd.)	89	7
Exhibit "A"—Schedule of claims for refund of taxes (omitted in printing)	95	
Proceedings in re general traverse	101	9
Defendant's motion to dismiss petitions	102	10
Argument and submission on defendant's motion to dismiss petitions	104	11
Opinion on motions to dismiss by Whitaker, J.	105	11
Judgment	110	15
Proceedings after judgment	110	15
Substitution of attorney of record	110	15
Clerk's certificate (omitted in printing)	111	
Stipulations re omission of Exhibits "A" from printed record	112	15
Order allowing certiorari	115	19

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 44641

WILSON & Co., INC., a Corporation,

vs.

THE UNITED STATES OF AMERICA

I. PETITION—March 31, 1939

To the Court of Claims of the United States and the Honorable Judges Thereof:

The above-named claimant, Wilson & Co., Inc., by this, its petition, respectfully shows:

1. That claimant at all times hereinafter mentioned was and is now a corporation, organized and existing under the laws of the State of Delaware, engaged in the preparation, packing and sale of meat products, including hog products for foreign and domestic commerce, and having an office at 4100 South Ashland Avenue, in the City of Chicago, and State of Illinois.

2. That subsequent to November 5, 1933, and prior to January 6, 1936, claimant exported, in its own name, large quantities of hog products to foreign countries (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam). Processing taxes [fol. 2] under Section 9 (a) of the Act of May 12, 1933, Ch. 25, 48 Stat. 31 (7 U. S. C. A. Sec. 609), known as the Agricultural Adjustment Act, have been paid by claimant upon the processing of the hogs from which the aforesaid hog products were produced. A floor stock tax under Section 16 (a) of the said act has been paid by claimant on that portion of the hog products so exported, which it held on November 5, 1933, the effective date of the processing tax on hogs. Both the said taxes were paid to the Collector of Internal Revenue for the First District of Illinois.

3. That the taxes so paid by claimant are refundable to it, as the exporter or consignor named in the bill of lading under which said hog products were exported, pursuant to

the provisions of Section 17 (a) of the said Agricultural Adjustment Act, as amended, which provides as follows:

"(a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. * * *"

[fol. 3] 4. That upon exportation of said hog products and prior to June 22, 1936, claims for the refund of processing and floor stock taxes previously paid were duly filed by claimant with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with regulations prescribed by the Commissioner of Internal Revenue. Attached hereto, marked Exhibit "A" and made a part of this petition, is a schedule which correctly shows under properly designated columns: (1) the number given by the Treasury Department to each claim filed by claimant for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog product; (6) the amount of tax paid, refund of which is sought by reason of such taxed hog product having been exported; (7) the month and year in which the product was processed; and (8) the date on which the tax was paid.

5. That each of the claims so filed by claimant (Exhibit "A", column 1) was rejected, in the amount shown in Exhibit "A", column 6, by the Commissioner of Internal Revenue.

6. That no action other than as aforesaid has been had on these claims in Congress or by any of the departments; that no person other than claimant is the owner thereof or interested therein; that no assignment or transfer of said claims [fol. 4] or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and that it believes the facts as hereinbefore stated to be true.

Wherefore, claimant prays judgment against the United States of America upon the facts and the law for $144,666.03 together with its reasonable costs and disbursements thereon.

Wilson & Co., Inc., by Edward Foss Wilson, President, Louis R. Simpson, Attorney for Claimant, Post Office Address, 4100 South Ashland Avenue, Chicago, Illinois.

[fols. 5-6] *Duly sworn to by Edward Foss Wilson. Jurat omitted in printing.*

[fols. 7-80] ("Exhibit A", the printing of which is omitted by stipulation of the parties, is a schedule of claims filed pursuant to section 17 (a) of the Agricultural Adjustment Act for the refund of taxes paid with respect to products exported. Said schedule shows: (1) The number given by the Treasury Department to each claim filed by petitioner for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog products exported; (6) the amount of tax paid, aggregating $144,666.03, refund of which is sought by reason of such taxed hog products having been exported; (7) the month and year in which the exported product was processed; and (8) the date on which the tax was paid.)

* * * * * * *

[fol. 81] IN COURT OF CLAIMS OF THE UNITED STATES

No. 44642

WILSON & CO., INC., of Kansas, a Corporation,

vs.

THE UNITED STATES OF AMERICA

II. PETITION—March 31, 1939

To the Court of Claims of the United States and the Honorable Judges Thereof:

The above-named claimant, Wilson & Co., Inc., of Kansas, by this its petition, respectfully shows:

1. That claimant at all times hereinafter mentioned was a corporation, organized and existing under the laws of the State of Delaware, engaged in the preparation, packing and sale of meat products, including hog products for foreign and domestic commerce, and having an office at 4100 South Ashland Avenue, in the City of Chicago, and State of Illinois.

2. That subsequent to November 5, 1933, and prior to January 6, 1936, claimant exported, in its own name, large quantities of hog products to foreign countries (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam). Processing taxes under Section 9 (a) of the Act of May 12, 1933, [fol. 82] Ch. 25, 48 Stat. 31 (7 U. S. C. A. Sec. 609), known as the Agricultural Adjustment Act, have been paid by claimant to the Collector of Internal Revenue at Chicago upon the processing of the hogs from which the aforesaid hog products were produced. A floor stock tax under Section 16 (a) of the said act has been paid by claimant to the Collector of Internal Revenue at Wichita, Kansas, on that portion of the hog products so exported, which it held on November 5, 1933, the effective date of the processing tax on hogs.

3. That the taxes so paid by claimant are refundable to it, as the exporter or consignor named in the bill of lading under which said hog products were exported, pursuant to the provisions of Section 17 (a) of the said Agricultural Adjustment Act, as amended, which provides as follows:

"(a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. * * *"

[fol. 83] 4. That upon exportation of said hog products and prior to June 22, 1936, claims for the refund of processing and floor stock taxes previously paid were duly filed by claimant with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with regulations prescribed by the Commissioner of Internal Revenue. Attached hereto, marked Exhibit "A" and made a part of this petition, is a schedule which correctly shows under properly designated columns: (1) the number given by the Treasury Department to each claim filed by claimant for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog product; (6) the amount of tax paid, refund of which is sought by reason of such taxed hog product having been exported; (7) the month and year in which the product was processed; and (8) the date on which the tax was paid.

5. That each of the claims so filed by claimant (Exhibit "A", column 1) was rejected, in the amount shown in Exhibit "A", column 6, by the Commissioner of Internal Revenue.

6. That no action other than as aforesaid has been had on these claims in Congress or by any of the departments; that no person other than claimant is the owner thereof or interested therein; that no assignment or transfer of said

claims or of any part thereof or interest therein has been [fol. 84] made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and that it believes the facts as hereinbefore stated to be true.

Wherefore, claimant prays judgment against the United States of America upon the facts and the law for $6,641.00 together with its reasonable costs and disbursements thereon.

Wilson & Co., Inc., of Kansas, by Edward Foss Wilson, President; Louis R. Simpson, Attorney for Claimant. Post Office Address: 4100 South Ashland Avenue, Chicago, Illinois.

[fols. 85-86] *Duly sworn to by Edward Foss Wilson. Jurat omitted in printing.*

[fols. 87-88] ("Exhibit A", the printing of which is omitted by stipulation of the parties, is a schedule of claims filed pursuant to section 17 (a) of the Agricultural Adjustment Act for the refund of taxes paid with respect to products exported. Said schedule shows: (1) The number given by the Treasury Department to each claim filed by petitioner for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog products exported; (6) the amount of tax paid, aggregating $6,641.00, refund of which is sought by reason of such taxed hog products having been exported; (7) the month and year in which the exported product was processed; and (8) the date on which the tax was paid.)

* * * * * * *

[fol. 89] IN COURT OF CLAIMS OF THE UNITED STATES

No. 44643

T. M. SINCLAIR & COMPANY, LIMITED, a Corporation,

vs.

THE UNITED STATES OF AMERICA

III. PETITION—March 31, 1939

To the Court of Claims of the United States and the Honorable Judges Thereof:

The above-named claimant, T. M. Sinclair & Company, Limited, by this, its petition, respectfully shows:

1. That claimant at all times hereinafter mentioned was a corporation, organized and existing under the laws of the State of Iowa, engaged in the preparation, packing and sale of meat products, including hog products for foreign and domestic commerce, and having an office at 4100 South Ashland Avenue, in the City of Chicago, and State of Illinois.

2. That subsequent to November 5, 1933, and prior to January 6, 1936, claimant exported, in its own name, large quantities of hog products to foreign countries (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam). Processing taxes under Section 9 (a) of the Act of May 12, 1933, Ch. 25, 48 [fol. 90] Stat. 31 (7 U. S. C. A. Sec. 609), known as the Agricultural Adjustment Act, have been paid by claimant to the Collector of Internal Revenue at Chicago upon the processing of the hogs from which the aforesaid hog products were produced. A floor stock tax under Section 16 (a) of the said act has been paid by claimant to the Collector of Internal Revenue at Des Moines, Iowa, on that portion of the hog products so exported, which it held on November 5, 1933, the effective date of the processing tax on hogs.

3. That the taxes so paid by claimant are refundable to it, as the exporter or consignor named in the bill of lading under which said hog products were exported, pursuant to the provisions of Section 17 (a) of the said Agricultural Adjustment Act, as amended, which provides as follows:

"(a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands,

American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. * * *"

[fol. 91] 4. That upon exportation of said hog products and prior to June 22, 1936, claims for the refund of processing and floor stock taxes previously paid were duly filed by claimant with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with regulations prescribed by the Commissioner of Internal Revenue. Attached hereto, marked Exhibit "A" and made a part of this petition, is a schedule which correctly shows under properly designated columns: (1) the number given by the Treasury Department to each claim filed by claimant for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog product; (6) the amount of tax paid, refund of which is sought by reason of such taxed hog product having been exported; (7) the month and year in which the product was processed; and (8) the date on which the tax was paid.

5. That each of the claims so filed by claimant (Exhibit "A", column 1) was rejected, in the amount shown in Exhibit "A", column 6, by the Commissioner of Internal Revenue.

6. That no action other than as aforesaid has been had on these claims in Congress or by any of the departments; that no person other than claimant is the owner thereof or interested therein; that no assignment or transfer of said claims

[fol. 92] or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and that it believes the facts as hereinbefore stated to be true.

Wherefore, claimant prays judgment against the United States of America upon the facts and the law for $67,710.30 together with its reasonable costs and disbursements thereon.

T. M. Sinclair & Company, Limited, By Edward Foss Wilson, President. Louis R. Simpson, Attorney for Claimant. Post Office Address, 4100 South Ashland Avenue, Chicago, Illinois.

[fols. 93-94] *Duly sworn to by Edward Foss Wilson. Jurat omitted in printing.*

[fols. 95-100] ("Exhibit A", the printing of which is omitted by stipulation of the parties, is a schedule of claims filed pursuant to section 17 (a) of the Agricultural Adjustment Act for the refund of taxes paid with respect to products exported. Said schedule shows: (1) The number given by the Treasury Department to each claim filed by petitioner for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog products exported; (6) the amount of tax paid, aggregating $67,710.30, refund of which is sought by reason of such taxed hog products having been exported; (7) the month and year in which the exported product was processed; and (8) the date on which the tax was paid.)

* * * * * * *

[fol. 101] IV. Proceedings in re General Traverse

On May 10, 1939, a General traverse was filed by the defendant.

On August 21, 1939, the defendant filed a motion for leave to withdraw the General traverse, and to file a motion to dismiss plaintiff's petitions for lack of jurisdiction.

On September 5, 1939, the court allowed defendants' motions for leave to withdraw the General traverse, and to file a motion to dismiss petitions for lack of jurisdiction.

[fol. 102] V. DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION FOR LACK OF JURISDICTION—Filed September 5, 1939

Comes now the defendant, by its Assistant Attorney General, and moves this Honorable Court to dismiss plaintiff's petition because—

(A) The Court is without jurisdiction to proceed with this case in respect to any amounts paid by plaintiff and sued for either as floor stocks or processing taxes, for the reason that plaintiff does not allege or claim in its petition—

(1) that it bore the burden of the amounts paid as tax and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, through inclusion of the amount in the price of the product, through reduction of the price paid for the raw material, or in any manner whatsoever, as required by Section 902 of the Revenue Act of 1936, and

[fol. 103] (2) that the claims sued upon were filed after the enactment of the Revenue Act of 1936, pursuant to regulations prescribed by the Commissioner of Internal Revenue thereunder, as required by Section 903 of said Act.

(B) The Court is also without jurisdiction to proceed with this case in respect to any amounts paid by plaintiff and sued for as processing taxes, under the provisions of Section 906 of the Revenue Act of 1936, which vests exclusive jurisdiction in the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia to judicially review the decision of the Commissioner of Internal Revenue and "the Board" in actions for the recovery of amounts paid or collected as processing taxes under the Agricultural Adjustment Act.

Samuel O. Clark, Jr., Assistant Attorney General.

[fol. 104] VI. Argument and Submission on Defendant's Motion to Dismiss Petitions for Lack of Jurisdiction

On November 6, 1939, the cases were argued and submitted together on defendant's motion to dismiss for lack of jurisdiction by Mr. Louis R. Simpson for plaintiffs, and by Mr. Guy Patten for defendant.

[fol. 105] VII. Opinion of the Court on Motions to Dismiss Petitions for Lack of Jurisdiction—Filed December 4, 1939

Mr. Louis R. Simpson for the plaintiffs.

Mr. Guy Patten, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the briefs.

Whitaker, Judge, delivered the opinion of the court:

These cases are pending on motions to dismiss for want of jurisdiction. The allegations of the petitions are in all essential respects the same. They allege that the plaintiffs exported certain hog products which had been processed by them, and on which they had paid the tax, which tax they sue to recover under section 17 (a) of the Agricultural Adjustment Act. This section provides for the refunding of taxes due and paid upon the exportation of any product upon which a processing tax had been paid.

[fol. 106] The defendant insists that this Court is without jurisdiction to grant the relief sought because: first, the petitions do not allege that the plaintiffs bore the burden of the tax and did not pass it on; and, second, because the petitions do not allege that the claims sued on were filed after the enactment of the Revenue Act of 1936; and, third, because exclusive jurisdiction is vested in the Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia to review decisions of the Commissioner of Internal Revenue and of the Board of Review in actions for the recovery of processing taxes, and that these are such actions.

The Government insists, specifically, that plaintiffs' remedy is under Title VII of the Revenue Act of 1936, and not under Title IV. If this position is correct, then this Court is without jurisdiction, because section 906 of Title VII provides for a review of the decision of the Commissioner

on claims for the refunding of processing taxes only by a Board of Review, and provides for a review of the decision of the Board only by the Circuit Courts of Appeal and by the United States Court of Appeals for the District of Columbia. It is also provided that claims for refund under this Title must have been filed after the passage of the Revenue Act of 1936, and the petitions in these cases show the claims were filed before that date.

We do not think, however, that plaintiffs' remedy lies under Title VII: first, because section 911 under Title VII expressly provides:

> The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16 and 17[1] of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. * * *

Title VII is the title providing for refunds to processors of the processing taxes paid by them. Section 911 under this Title expressly exempts from its provisions processors who are entitled to a refund under section 17 of the Agricultural Adjustment Act on account of the exportation of the articles processed. Language could hardly be more explicit.

[fol. 107] The defendant says that the reports of the House and Senate Committees on the Revenue Act of 1936 show that relief was to be had by processors-exporters only under Title VII. It seems to us that the language of section 911 excluding processors-exporters from the terms of Title VII is too explicit to necessitate or to warrant resort to the Committee Reports. Standard Fashion Co. v. Magrane-Houston Co. 258 U. S. 346.

Secondly, we think it would be inconsistent with the purpose of section 17 (a) of the Agricultural Adjustment Act and of section 601 of the Revenue Act of 1936 to exclude processors-exporters from the benefits of those sections. The purpose of Congress in the enactment of these sections was to enable Americans to compete with the nationals of other countries in the world markets. If subject to this processing tax, they couldn't do this unless the nationals of other governments were subject to a similar tax. If they were, it permitted the American exporter to undersell

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[1] This section allows "drawbacks" on exportations.

them and thus dispose of our surplus farm products, which was something very much to be desired at the time of the passage of these Acts. This being the purpose of Congress, there would be no reason for differentiating between an exporter who was not liable for the processing tax and an exporter who was. The purpose was to enable exporters to sell American goods in the world markets as cheaply as possible. Congress, therefore, would have defeated its own purpose if it had required any exporter to pay the tax, whether that exporter was a processor or not.

This view is given support by the fact that section 17 (b) of the Agricultural Adjustment Act permits the processing of articles for exportation without the payment of any tax thereon, if a bond is given to insure the exportation of the article processed. If exported no tax is due and the bond is cancelled. This makes it all the more clear that Congress intended to relieve the processor from the processing tax as to all articles exported. If this be true, of course the processor-exporter is entitled to the refund provided for in section 17 (a) of the Agricultural Adjustment Act and in Title IV of the Revenue Act of 1936.

[fol. 108] But the defendant says that section 601 (b) expressly prohibits refunds to processors under section 17 (a), relying upon this language:

> Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

If this sentence means what defendant contends, then a processor is entirely without a remedy, because, as we have seen, section 911 excludes him from the remedy of Title VII. It seems to us that the proper construction of this language, in order that the several sections of the Act might be harmonious, is that Congress therein was referring to processors, as distinguished from exporters, and not to processors who were both processors and exporters. The only purpose of the sentence was to make it plain that processors who are not exporters were not to have the benefit of that section, but were to be confined to the relief provided for processors as such.

This view is in harmony with the decision of the Circuit Court of Appeals for the 7th Circuit in Cudahy Bros. Co.

v. LaBudde, et al., 92 F. (2nd) 937. This decision was followed by the District Court for the 2nd Circuit in Neuss, Hesslein & Co., Inc. v. United States, Prentice-Hall Federal Tax Service (1939), Par. 5.286.

If we are correct, then, in saying that plaintiffs are entitled to relief under Title IV, it is not necessary that they show they bore and did not pass on the burden of the tax, nor that the claims for refund were filed after the passage of the Revenue Act of 1936. These provisions apply only to claims under Title VII.

Since the plaintiffs' claims are grounded on Title IV, Section 906 (providing for review of the Commissioner's action on the claim for refund) has no application, since it is confined to proceedings to recover processing taxes and since these are suits to recover drawbacks on exportations.

However, we do not think this court has jurisdiction of proceedings under Title IV by reason of the provisions of [fol. 109] section 601 (e) of Title IV of the Revenue Act of 1936, which provides:

> The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

The defendant does not defend on this ground, but since we are clearly of opinion that this deprives us of jurisdiction, the petitions must be dismissed on this ground.

The plaintiffs say their actions are not based on section 601 of the Revenue Act of 1936, but on section 17 (a) of the Agricultural Adjustment Act, which they say was not declared invalid by the Supreme Court in United States v. Butler, 297 U. S. 1, and that under this Act they were entitled to maintain suit. But Section 17 (a) of the Agricultural Adjustment Act, whether or not declared unconstitutional by the Butler case, was reenacted by section 601 of the Revenue Act of 1936, and thus became a part of that section, and subsection (e) thereof says that as to all claims for refund under that section the action of the Commissioner shall be final and that no court shall have jurisdiction to review it. Therefore, whether or not the plaintiffs may have had the right to maintain these suits under section 17 (a) before the passage of the Revenue Act of 1936, this right was taken away from them by section 601 (e) of the Revenue Act of 1936. This, of course, Congress had

the right to do. Whether or not it should have done so is not for us to decide. Section 601 of the Revenue Act of 1936 now constitutes the only remedy available to plaintiffs.

It results that plaintiffs' petitions must be dismissed. It is so ordered.

Williams, Judge; Littleton, Judge; Green, Judge; and Whaley, Chief Justice, concur.

[fol. 110] VIII. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of December, A. D. 1939, judgment was ordered to be entered as follows:

It is Ordered that defendant's motions to dismiss petitions be allowed and petitions be dismissed.

IX. PROCEEDINGS AFTER JUDGMENT

On January 10, 1940, the plaintiffs filed a motion for leave to file amended petitions.

On February 5, 1940, the court overruled plaintiffs- motion for leave to file amended petitions.

X. SUBSTITUTION OF ATTORNEY OF RECORD

On February 8, 1940, plaintiffs filed a motion to substitute Paul E. Shorb as attorney of record (present attorney, Louis R. Simpson withdrawing).

On February 14, 1940, the court allowed the substitution of Paul E. Shorb as attorney of record without prejudice to former attorney.

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 112] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 778

STIPULATION WITH RESPECT TO THE OMISSION OF "EXHIBIT A" FROM THE PRINTED RECORD—Filed March 1, 1940

It is hereby stipulated between the petitioner, by its attorney, and the respondent, by its Solicitor General, that

in the printing of the record in the above-entitled cause the Clerk shall omit therefrom "Exhibit A" which is attached to the original petition of petitioner filed in the Court of Claims, and shall include in the place thereof the following statement:

" 'Exhibit A', the printing of which is omitted by stipulation of the parties, is a schedule of claims filed pursuant to section 17 (a) of the Agricultural Adjustment Act for the refund of taxes paid with respect to products exported. Said schedule shows: (1) The number given by the Treasury Department to each claim filed by petitioner for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog products exported; (6) the amount of tax paid, aggregating $144,666.03, refund of which is sought by reason of such taxed hog products having been exported; (7) the month and year in which the exported product was processed; and (8) the date on which the tax was paid."

Dated this 13th day of February, 1940.

Paul E. Shorb, Attorney for Petitioner. Francis Biddle, Solicitor General of the United States.

[fol. 112½] [File endorsement omitted.]

[fol. 113] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 779

STIPULATION WITH RESPECT TO THE OMISSION OF "EXHIBIT A" FROM THE PRINTED RECORD—Filed March 1, 1940

It is hereby stipulated between the petitioner, by its attorney, and the respondent, by its Solicitor General, that in the printing of the record in the above-entitled cause the Clerk shall omit therefrom "Exhibit A" which is attached to the original petition of petitioner filed in the Court of Claims, and shall include in the place thereof the following statement:

"'Exhibit A', the printing of which is omitted by stipulation of the parties, is a schedule of claims filed pursuant to section 17 (a) of the Agricultural Adjustment Act for the refund of taxes paid with respect to products exported. Said Schedule shows: (1) The number given by the Treasury Department to each claim filed by petitioner for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog products exported; (6) the amount of tax paid, aggregating $6,641.00, refund of which is sought by reason of such taxed hog products having been exported; (7) the month and year in which the exported product was processed; and (8) the date on which the tax was paid."

Dated this 13th day of February, 1940.

Paul E. Shorb, Attorney for Petitioner. Francis Biddle, Solicitor General of the United States.

[fol. 113½] [File endorsement omitted.]

[fol. 114] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 780

STIPULATION WITH RESPECT TO THE OMISSION OF "EXHIBIT A" FROM THE PRINTED RECORD—Filed March 1, 1940

It is hereby stipulated between the petitioner, by its attorney, and the respondent, by its Solicitor General, that in the printing of the record in the above-entitled cause the Clerk shall omit therefrom "Exhibit A" which is attached to the original petition of petitioner filed in the Court of Claims, and shall include in the place thereof the following statement:

"'Exhibit A', the printing of which is omitted by stipulation of the parties, is a schedule of claims filed pursuant to section 17 (a) of the Agricultural Adjustment Act for

the refund of taxes paid with respect to products exported. Said Schedule shows: (1) The number given by the Treasury Department to each claim filed by petitioner for the refund of processing and floor stock taxes upon exported hog products; (2) the serial number given by the Collector of Customs of the port of export to the application for inspection of each shipment exported; (3) the description of the product exported; (4) the tax paid weight or content of the product exported; (5) the rate of tax applicable to the particular class of hog products exported; (6) the amount of tax paid, aggregating $67,710.30, refund of which is sought by reason of such taxed hog products having been exported; (7) the month and year in which the exported product was processed; and (8) the date on which the tax was paid."

Dated this 13th day of February, 1940.

Paul E. Shorb, Attorney for Petitioner. Francis Biddle, Solicitor General of the United States.

[114½] [File endorsement omitted.]

Endorsed on cover: Enter Dean G. Acheson. File Nos. 44,185, 44,186, 44,187. Court of Claims. Term No. 778. Wilson and Co., Inc., Petitioner, vs. The United States. Term No. 779. Wilson & Co., Inc., of Kansas, Petitioner, vs. The United States. Term No. 780. T. M. Sinclair & Company, Limited, Petitioner, vs. The United States. Petition for writs of certiorari and exhibit thereto. Filed March 1, 1940. Term Nos. 778, O. T., 1939, 779, O. T., 1939, 780, O. T., 1939.

[fol. 115] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 23

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 116] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 24

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 25

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 1 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939

No. [redacted] 23

WILSON AND CO., INC., A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. [redacted] 24

WILSON & CO., INC., OF KANSAS, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. [redacted] 25

T. M. SINCLAIR & COMPANY, LIMITED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

J. HARRY COVINGTON,
DEAN G. ACHESON,
PAUL E. SHORB,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writs	4
Conclusion	7
Appendix	8

Citations.

Cases:	
Cudahy Bros. Co. v. *LaBudde*, 92 F. (2d) 937, certiorari denied, 303 U. S. 659	4, 5, 6
Neuss, Hesslein & Co., Inc., v. *United States*, 30 F. Supp. 595	4
Campbell v. *United States*, 107 U. S. 407	5
Statutes:	
Agricultural Adjustment Act of May 12, 1933, as amended, Section 17	6
Revenue Act of 1936, Title IV, VII	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 778

WILSON AND CO., INC., A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 779

WILSON & CO., INC., OF KANSAS, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 780

T. M. SINCLAIR & COMPANY, LIMITED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Wilson and Co., Inc., Wilson & Co., Inc. of Kansas, and T. M. Sinclair & Company, Limited, petitioners herein, pray that writs of certiorari issue to review the decision of the

Court of Claims entered December 4, 1939, dismissing the petitions filed in that court in the instant cases for lack of jurisdiction.

Opinions Below.

The opinion of the Court of Claims covering all three cases is reported at 30 F. Supp. 672.

Jurisdiction.

The judgments and orders of the Court of Claims were entered on December 4, 1939. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Question Presented.

Whether the Court of Claims erred in holding that it lacked jurisdiction to entertain the instant suits for recovery of certain amounts claimed by petitioner as export drawbacks because of the provisions of Section 601(e) of the Revenue Act of 1936.

Statutes Involved.

The pertinent provisions of the Agricultural Adjustment Act and of the Revenue Act of 1936 are printed in the Appendix.

Statement.

This action was instituted by the filing of three petitions in the Court of Claims on March 31, 1939. The allegations of the petition in the Wilson and Co., Inc. case, which, *mutatis mutandis,* is identical with the petitions in the other cases, may be summarized as follows:

Petitioner is a corporation engaged in the preparation, packing and sale of meat products, including hog products, for foreign and domestic commerce. Between November 5, 1933 and January 6, 1936, petitioner exported, in its own

name, large quantities of hog products on which it had paid processing taxes and floor stock taxes pursuant to Sections 9(a) and 16(a) respectively of the Agricultural Adjustment Act, as amended (Act of May 12, 1933, c. 25, 48 Stat. 31, U. S. C., Title 7, Secs. 609, 616).

Upon the exportation of said hog products, and prior to June 22, 1936, the date the Revenue Act of 1936 was enacted, claims for refund were duly filed by petitioner with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with the regulations prescribed by the Commissioner of Internal Revenue.[1] Each of these claims was rejected by the Commissioner in the amount shown in Exhibit A (See footnote 1, *supra*). Petitioner alleged that the taxes so paid are refundable to it pursuant to the provisions of Section 17(a) of the Agricultural Adjustment Act as amended (U. S. C., Title 7, Section 617).

On September 5, 1939 respondent moved to dismiss the petitions on the ground that the Court of Claims lacked jurisdiction to proceed with the cases with respect to amounts paid either as processing or floor stock taxes because petitioners did not allege or claim compliance with Section 902 or 903 of the Revenue Act of 1936, and also upon the ground that the court was without jurisdiction with respect to amounts paid as processing taxes because of Section 906 of that Act. In short, respondent asserted that petitioners could recover only under Title VII of the 1936 Act, which does not authorize suit in the Court of Claims. The Court of Claims, on December 4, 1939, overruled each of the grounds set forth in the motion to dismiss, but granted the motion nevertheless by reason of its conclusion, independently arrived at, that Section 601(e) of the Revenue

[1] The details of the claims are set out in Exhibit A to the petitions, which, by stipulation, are not printed in this Court. They are contained, however, in the certified record on file with the Clerk.

Act of 1936 deprived it of jurisdiction over the claims for both processing taxes and floor stock taxes.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that Section 601(e) of the Revenue Act of 1936 deprived it of jurisdiction to entertain these actions.

2. In not holding that petitioners were entitled to recover the amounts set out in their claims for refund.

3. In dismissing the petitions.

Reasons for Granting the Writs.

1. The decision of the court below, dismissing these petitions on the ground that it lacked jurisdiction to entertain them, is squarely in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Cudahy Bros. Co.* v. *LaBudde,* 92 F. (2d) 937, certiorari denied, 303 U. S. 659, and is also in conflict with the decision of the District Court for the Southern District of New York in *Neuss, Hesslein & Co., Inc.* v. *United States,* 30 F. Supp. 595. In the *Cudahy* case a claim of precisely the same character was entertained and recovery allowed, and in the *Neuss, Hesslein* case the Government's motion to dismiss for lack of jurisdiction was denied.

The opinions in the instant case and in the *Cudahy* case are consistent up to a certain point: each of them rejects the contention urged by the government that the remedy of processor-exporters seeking to recover export drawbacks on products subsequently exported is under Title VII of the Revenue Act of 1936. The Court of Claims, however, contrary to the Circuit Court of Appeals for the Seventh Circuit and the District Court for the Southern District of New York, held that nonetheless it was deprived of jurisdiction by virtue of the provisions of Section 601(e) of Title IV of the Revenue Act of 1936 which provides:

> "The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination."

This point was not argued and, indeed, was specifically disclaimed by the Government.

Were the position of the Court of Claims sound, obviously the District Courts and the Circuit Courts of Appeal are equally without jurisdiction in cases such as this. Indeed, the same argument was advanced by the Government in its unsuccessful petition for certiorari in the *Cudahy* case.[2] Beyond question, the two decisions are squarely in conflict.

2. The decision of the court below is based upon a wholly unwarranted application of Section 601(e). The instant suit, as indicated in the bill of complaint, is based upon Section 17(a) of the Agricultural Adjustment Act, as amended, *infra*, p. 8, which provided for a drawback of taxes paid upon exportation in order to encourage foreign trade and to relieve the country of undesirable domestic surpluses. Moreover, Congress had provided in Section 17(b) of the Agricultural Adjustment Act that processors might, instead of paying the tax, simply put up a bond guaranteeing export. See *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) at 938. By virtue of Section 17(a) petitioner became entitled to drawbacks in the amount of the taxes previously paid when it exported these products. *Campbell* v. *United States*, 107 U. S. 407.

The court below, however, has decided that, irrespective of petitioner's rights under Section 17(a), that section "became a part of" Section 601 of Title IV of the Revenue Act of 1936, *infra*, p. 8, because it was reenacted by subsection (a) of Section 601, and that consequently refunds must be governed by Section 601(e). That conclusion dis-

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[2] Petition for certiorari No. 823, October Term, 1937, p. 9.

regards the express mandate of Section 601(a), that the reenactment of Section 17(a) is for the purpose of allowing refunds "in accordance *therewith*" (not "herewith"), and also the obvious inapplicability of the other portions of Section 601 to a processor-exporter such as the present petitioner. See *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) at 939-940.

In effect the Court of Claims holds that although petitioners are clearly entitled to refunds merely by proving export of tax-paid commodities, they have no judicial recourse whatever if the Commissioner denies their claim. The Court of Claims agrees with the Seventh Circuit that Title VII is inapplicable and thus any judicial remedies therein provided are not available. It agrees that upon proof of export alone petitioners are entitled to a refund under Section 17(a) of the Agricultural Adjustment Act, as reenacted. But by a gratuitous and distorted interpretation of Section 601(e) of the Revenue Act of 1936, it concludes that neither it nor any other court has jurisdiction to require payment.

3. The conflict of decisions between the *Cudahy* case and the instant one should be resolved by this Court. Unless it is resolved, claimants such as petitioners will recover if they institute an action in the District Courts, as in the *Cudahy* and *Neuss, Hesslein* cases, but will not recover if they institute an action in the Court of Claims. That result is plainly contrary to the intention of Congress. Moreover, petitioners are advised by the Bureau of Internal Revenue that there are not less than four thousand claims of this character which may still be the subject of litigation and that the amount involved in those claims is roughly $2,000,000. Obviously, therefore, the matter is of substantial importance in the proper administration of the revenue laws.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

J. HARRY COVINGTON,
DEAN G. ACHESON,
PAUL E. SHORB,
Counsel for Petitioners.

March, 1940.

APPENDIX.

Section 17 of the Agricultural Adjustment Act of May 12, 1933, as amended (Chapter 25, 48 Stat. 31), provides as follows:

> (a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. * * *

The Revenue Act of 1936 (Chapter 690, 49 Stat. 1648) provides as follows:

> TITLE IV—EXPORT, CHARITABLE, ETC., REFUNDS AND FLOOR-STOCKS ADJUSTMENT UNDER AGRICULTURAL ADJUSTMENT ACT.
>
> SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.
>
> (a) The provisions of sections 10 (d), 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax or its equivalent under section 16 (e) (3), took place prior to January 6, 1936.

(b) Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. No refund under this section shall be allowable to any person with respect to any articles where such person prior to January 6, 1936, paid an amount as tax under the Agricultural Adjustment Act, as amended, by taking as a credit against such amount an amount otherwise allowable as a refund with respect to such articles under sections 15 (a), 15 (c), 16 (e) (1), 16 (c) (3), or 17 (a) of said Act. No refund under this section shall be allowed to any person except to the extent that he establishes that he has not received, and is not entitled to receive, reimbursement of such amount from the processor or other vendor with respect to the articles on which the claim is based. No claim under this section (except claims of processors under section 15 (a)) shall be disallowed on the ground that the tax with respect to the article or the commodity from which processed has not been paid.

(c) No refund under this section shall be made unless the claimant files a claim therefor prior to January 1, 1937, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and no claim shall be allowed in an amount less than $10. Sections 16 (g) and 21 (f) of the Agricultural Adjustment Act, as amended, are repealed.

(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employees, or agent of the United States.

(e) The determination of the Commissioner of Internal Revenue with respect to any refund under this

section shall be final and no court shall have jurisdiction to review such determination.

(f) No interest shall be allowed in connection with any refund made under this section.

(g) Section 16 (e) (1) of the Agricultural Adjustment Act, as reenacted by subsection (a) of this section, is amended by striking out "subsequent to June 26, 1934" and by inserting in lieu thereof "on or after June 1, 1934."

SEC. 602. FLOOR STOCKS AS OF JANUARY 6, 1936.

(a) There shall be paid to any person who, at the first moment of January 6, 1936, held for sale or other disposition (including manufacturing or further processing) any article processed wholly or in chief value from a commodity subject to processing tax, an amount computed as provided in subsection (b), except that no such payment shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

(b) The amount of the payment under subsection (a) shall be equal to the processing tax which would have been payable with respect to the commodity from which the article was processed, if it had been processed on January 5, 1936, but not in excess of (1) the amount of the burden of the tax with respect to the article which was shifted to the claimant in the price he paid for the article * * *.

* * * * * * *

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

SEC. 901. REPEALS.—Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.—No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or

collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.—No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such

claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require the claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.—Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.—Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. * * *

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. * * *

* * * * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has its principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. * * * The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as pro-

vided in Sections 239 and 240 of the Judicial Code, as amended.

* * * * * * *

SEC. 911. INAPPLICABILITY TO CERTAIN REFUNDS.

The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person.

* * * * * * *

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interested applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [illegible] 23

WILSON AND CO., INC, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. [illegible] 24

WILSON & CO., INC., OF KANSAS, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 780 25

T. M. SINCLAIR & COMPANY, LIMITED,
A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

J. HARRY COVINGTON,
DEAN G. ACHESON,
PAUL E. SHORB,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 778

WILSON AND CO., INC, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 779

WILSON & CO., INC., OF KANSAS, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 780

T. M. SINCLAIR & COMPANY, LIMITED,
A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

This reply to the brief filed by the United States in opposition to the petition for certiorari seems necessary in order to avoid a possible misapprehension.

The opposition to certiorari by the United States seems to be based largely upon the fact that, notwithstanding the square conflict of results between the instant case and *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) 937 (C. C. A. 7th), certiorari denied, 303 U. S. 659, the decisions are in accord that Title IV and not Title VII is applicable to these and like clams for refund. The brief in opposition also states (ftn. 5, page 6) that "If certiorari should be granted" in this case, the Government reserves the right to urge that the claims properly fall under Title VII instead of Title IV. These two statements, taken together with the fact of opposition to certiorari, might seem to indicate that the United States accepts the concluson reached by both the *Cudahy* and the instant cases—that the taxpayers are entitled to refund in full (although the Court of Claims held that it had no power to compel the result).

That implication is not in accord with the facts. The officials of the Bureau of Internal Revenue have advised these taxpayers that it does not accept these decisions as determinative, and that it will not now make refunds under Title IV.

Notwithstanding the unanimity of decision to the contrary, the Bureau is still of opinion that claimants such as these taxpayers fall under Title VII, and must prove their claims thereunder, with the concomitant burdens and difficulties of proof. Consequently, taxpayers will be able to obtain refunds, notwithstanding the judicial decisions unanimously in their favor, only after a decision by this Court, which will, of course, be accepted as conclusive by the Bureau of Internal Revenue.

We submit, therefore, that the petition for certiorari should be granted. With respect to the Government's argument that the *Cudahy* decision is not in conflict with the instant one, it is sufficient to point out that the question upon which the two cases are in conflict was necessarily present in the *Cudahy* case since it was a *jurisdictional* objection which could not be waived. Indeed, the instant case

illustrates the point perfectly—the point was likewise not raised by the Government in the Court of Claims; it was taken up *suo motu* by the Court. Moreover, the point was specifically raised and decided against the Government in *Neuss, Hesslein & Co., Inc.* v. *United States,* 30 F. Supp. 595 (S. D. N. Y.).

Respectfully submitted,

J. Harry Covington,
Dean G. Acheson,
Paul E. Shorb,
Counsel for Petitioners.

April, 1940.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 23

WILSON & CO., INC., a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

No. 24

WILSON & CO., INC., OF KANSAS, a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

No. 25

T. M. SINCLAIR & COMPANY, LIMITED, a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

J. HARRY COVINGTON,
JAMES D. COONEY,
PAUL E. SHORB,
DEAN ACHESON,
H. THOMAS AUSTERN,
Counsel for Petitioners.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
The basic position of Section 17(a) in the Agricultural Adjustment Act	2
The operation of Section 17	6
Congressional attitude toward Section 17	8
Specification of Errors to be Urged	11
Summary of Argument	12
Argument	14
I. Petitioner is entitled to the export drawbacks under Section 17(a), and is not required to prove its claim under Title VII	14
II. The court below erred in dismissing the action on the ground that it lacked jurisdiction	29
Conclusion	39
Appendix	40

CITATIONS

Cases:

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337 ..... 26, 27, 38
Becker Steel Co. v. *Cummings*, 296 U. S. 74 38
Blodgett v. *Holden*, 275 U. S. 142 23
Campbell v. *United States*, 107 U. S. 407 ..... 16, 24
Cary v. *Curtis*, 3 How. 234 38
Crowell v. *Benson*, 285 U. S. 22 23
Cudahy Bros. Co. v. *LaBudde*, 92 F. (2d) 937 (C. C. A. 7th, 1937), *cert. denied* 303 U. S. 659 ..... 15, 19, 23
DeGroot v. *United States*, 5 Wall. 419 30
Dismuke v. *United States*, 297 U. S. 167 ..... 34, 36
Durant v. *United States*, 28 Ct. Cls. 356 (1893) 24
Lloyd Sobaudo Societa v. *Elting*, 287 U. S. 329 ..... 34, 37
Lynch v. *United States*, 292 U. S. 571 ..... 24, 25, 27, 28, 30, 31, 38
McLean v. *United States*, 226 U. S. 374 37
Medbury v. *United States*, 173 U. S. 492 37
Neuss Hesslein & Co., Inc. v. *United States*, 30 F. Supp. 595 (S. D. N. Y., 1939) 15, 20
Russian Volunteer Fleet v. *United States*, 282 U. S. 481 23
Silberschein v. *United States*, 266 U. S. 221 36
United States v. *Babcock*, 250 U. S. 328 30
United States v. *Butler*, 297 U. S. 1 ..... 9, 10, 15, 16, 20, 25, 38

Page

United States v. *Compagnie Générale Transatlantique*, 26 F. (2d) 195 (C. C. A. 2d, 1928) 37
United States v. *Hvoslef*, 237 U. S. 1..... 37
United States v. *Laughlin*, 249 U. S. 440 37
United States v. *MacVeagh*, 214 U. S. 124 37
United States v. *Williams*, 278 U. S. 255..... 36
Williamsport Wire Rope Co. v. *United States*, 277 U. S. 551..... 33
Wilson & Co. v. *United States*, 30 F. Supp. 672 (Ct. Cls., 1939)..... 1
Wright v. *Vinton Branch Bank*, 300 U. S. 440..... 23

Statutes:

Act of February 26, 1845, c. 22, 5 Stat. 727..... 38
Act of February 13, 1925, Sec. 3(b), as amended by the Act of May 22, 1939 1
Act of August 24, 1935, Secs. 28, 32, c. 641, 49 Stat. 750, 770, 774....3, 8, 9
Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, as amended, 48 Stat. 676, 49 Stat. 48, 770, 1739, U. S. C., Title 7, Sec. 617 40
Judicial Code, Sec. 145, U. S. C., Title 28, Sec. 250..... 30
Revenue Act of 1936 (June 22, 1936), c. 690, 49 Stat. 1648..... 41
Tariff Act of 1930, Secs. 313, 553, 46 Stat. 693, 742, U. S. C. Title 19, Secs. 1313, 1553 5

Regulations:

Customs Regulations, 1931, Art. 1049..... 5
Customs Regulations, 1937, Arts. 1038-41, 1070 5
Internal Revenue Regulations 83, Arts. 2-30.....5, 15

Legislative Material:

Hearings before the House Committee on Agriculture, 72d Cong., 2d Sess. 3
Hearings before the Senate Committee on Agriculture and Forestry, 73d Cong., 1st Sess. 5
Report of House Committee on Agriculture, H. Rep. No. 6, 73d Cong., 1st Sess. 5
Report of House Committee on Ways and Means, H. Rep. No. 2475, 74th Cong., 2d Sess. 17, 21, 55
Report of Senate Finance Committee, Sen. Rep. No. 2156, 74th Cong., 2d Sess. 17, 21, 22, 58
H. Doc. No. 864, 76th Cong., 3d Sess. 28

Miscellaneous:

Agricultural Statistics, 1937 (U. S. Dept. of Agriculture)..... 7
An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act (U. S. Treasury Dept., 1937)..... 7

Page

Economic Bases for the Agricultural Adjustment Act (U. S. Dept. of Agriculture, 1933) 3, 6

Economic Situation of Hog Producers (U. S. Dept. of Agriculture, Bureau of Agricultural Economics, 1933, Sen. Doc. No. 184, 72d Cong., 2d Sess.) 6

Livestock under the AAA (Brookings Institution, 1935) 7

Restatement. Contracts, Secs. 12, 29, 52 24

Williston, Contracts (Rev. ed. 1936) Ch. V. 24

Supreme Court of the United States

OCTOBER TERM, 1940

No. 23

WILSON & CO., INC., a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

No. 24

WILSON & CO., INC., OF KANSAS, a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

No. 25

T. M. SINCLAIR & COMPANY, LIMITED, a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Claims covering all three cases (R. 11-14) is reported at 30 F. Supp. 672.

JURISDICTION

The judgments and orders of the Court of Claims were entered on December 4, 1939 (R. 15). The petition for certiorari was filed on March 1, 1940, and was granted on April 22, 1940 (R. 19). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether petitioner is entitled to recover in this action amounts to which it was entitled as export drawbacks under the Agricultural Adjustment Act, as amended.

STATUTES INVOLVED

The pertinent provisions of the Agricultural Adjustment Act and of the amendments thereto, and of the Revenue Act of 1936, are printed in the Appendix.

STATEMENT

This action was instituted by the filing of three petitions in the Court of Claims on March 31, 1939. The allegations of the petition in No. 23, filed by Wilson & Co., Inc., are, *mutatis mutandis,* identical with the petitions in the other cases. Reference will be made, therefore, only to the record in that case.

Petitioner is a corporation engaged in the packing and sale of meat products, including hog products, for foreign and domestic commerce. During the period of the processing taxes levied by the Agricultural Adjustment Act, as amended, from November, 1933, to January, 1936, it exported in its own name as consignor large quantities of its hog products to various foreign countries (R. 1). For several years petitioner received on these exports the drawbacks provided by Section 17(a) of that Act. The failure of the Commissioner of Internal Revenue to pay the export drawbacks due to petitioner on later exports has made this action necessary.

The basic position of Section 17(a) in the Agricultural Adjustment Act.—The export drawbacks provided by Section 17(a) were an integral part of the agricultural assistance program embraced in the Agricultural Adjustment Act. That Act was a comprehen-

sive emergency statute designed to remedy the depressed state of agriculture in the United States. Two basic methods were to be employed. The first was a combination of voluntary reductions in acreage and cash benefits to farmers. The second, with which the present case is more directly concerned, was a program of diverting agricultural surpluses from regular domestic markets and promoting exports of American agricultural commodities. The absolute necessity, in connection with this second method, of preserving our foreign markets—indeed, of increasing them—was recognized from the outset.[1]

To pay the cost of this Act, Congress levied a tax on the first domestic processing of a number of basic agricultural products, including hogs. The tax was a heavy one, but extreme care was taken to protect the existing markets—both domestic and export—for the products which it was the basic purpose of the Act to foster.

[1] The condition of the export trade in agricultural products had been emphasized in the Congressional hearings on the Act. See *Hearings before the House Committee on Agriculture*, 72d Cong., 2d Sess., pp. 142-145. See also *Economic Bases for the Agricultural Adjustment Act* (U. S. Dept. of Agriculture, 1933), pp. 14-19, 34. The original Act of May 12, 1933, contained (in addition to the vitally important Section 17) a provision authorizing the Secretary of Agriculture to expend the proceeds of the processing taxes for, *inter alia*, "expansion of markets". Section 12 (b), 48 Stat. 31. In the comprehensive amendments of 1935, this limited provision was removed from Section 12(b), and an appropriation made of 30 per cent of the gross receipts from customs duties to be spent, *inter alia*, "to . . . encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation . . . ." Section 32, Act of August 24, 1935, 49 Stat. 750, 774.

Domestically, prejudicial competition between taxed and untaxed commodities was avoided by compensating taxes on competitive products which bore no processing tax burden. Thus, products processed before the processing tax became effective were automatically subjected to a floor stocks tax in an amount equivalent to the processing tax. Section 16(a)(1).[2] Further, a compensating tax was imposed upon imports of goods already processed from taxable commodities. Section 15(e). To prevent shifts in consumption from taxed products to substitute products made from untaxed commodities, *e. g.*, cotton vs. paper or jute, a compensating tax was also levied upon the first domestic processing of such competing commodities wherever the Secretary of Agriculture found that such shifts might occur. Section 15(d). Or if this could not be done and a shift in the domestic consumption of a particular taxed product might follow, the Secretary could certify this result, and the tax would be refunded. Sec. 15(a).

With respect to the export market, there would obviously have been a drastic dislocation of foreign markets if products made from taxed commodities and exported from the United States had been forced to compete with untaxed foreign goods. This was avoided by the system of export drawbacks which form the basis of the present action. By Section 17 of the Act, *infra*, p. 40, Congress insured that goods sold abroad would

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[2] Conversely, if a processing tax were wholly terminated, automatic refunds on taxed floor stocks were provided. Section 16 (a)(2). If, during the life of the Act, the rate of the processing tax was changed (as was true of the processing tax on hogs, for example), compensating changes were made in floor stocks taxes by additional levies or refunds. Section 16(e).

be relieved of the additional burden of the domestic processing tax.[3]

In general, Section 17 provided two methods by which a processor might eliminate the tax from the prices at which he sold abroad. By subsection (a) Congress agreed that the tax which had been paid on the processing of a commodity would be repaid upon proof of export to the exporter consignor or his nominee.[4] Or, by subsection (b), Congress provided that the processing of goods destined for export might be done under bond, no tax being paid at all, and liability under the bond discharged upon proof of export.[5] The difference was solely a matter of mechanics,[6] and each method insured

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[3] The purpose of Section 17 is made clear in the report of the House Committee on Agriculture (H. Rep. No. 6, 73d Cong., 1st Sess.) which stated (p. 6):

> In addition, provision is made for refund of processing taxes with respect to exports, thereby continuing the present competitive situation of our products in foreign markets.

See also *Hearings before the Senate Committee on Agriculture and Forestry*, 73d Cong., 1st Sess., p. 65.

[4] See also Internal Revenue Regulations 83, Articles 2-13. The sub-section was modeled on the familiar drawback provisions of the tariff law. Tariff Act of 1930, Section 313 (46 Stat. 693; U. S. C., Title 19, Sec. 1313). The regulations under that Act had long recognized the exporter consignor as the one primarily entitled to drawback payments. See Customs Regulations, 1931, Art. 1049; Customs Regulations, 1937, Art. 1038-41, 1070.

[5] See Regulations 83, Articles 14-30. These provisions were intended to be parallel to those of the tariff law (Tariff Act of 1930, Sec. 553; 46 Stat. 742, U. S. C., Title 19, Sec. 1553) which permit goods to be bonded in transit. See *Senate Hearings, supra*, p. 65.

[6] Subsection (b), of course, could be taken advantage of to the full extent only by a processor who knew at the time of processing that the resultant products from a specific quantity of the taxed

that exported goods could be sold ex-tax in competition with foreign goods in foreign markets.

The operation of Section 17.—It is undeniable that processors who sold abroad relied completely upon the promise of the Government to pay export drawbacks under Section 17(a). It was a commonplace that American agricultural products—hog products such as bacon and lard as well as cotton and tobacco and wheat —were competing in the world markets with like products from other countries where no processing taxes were levied, and where often export subsidies were paid. The Government economists realized that the imposition of a processing tax would raise the domestic price level relative to the world price level of any commodity by approximately the amount of the tax on that commodity.[7] Indeed, Section 17 was a Congressional recognition of the fact that the domestic price would be higher than the world price by *at least* the amount of the tax.

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commodity were to be exported. Processing establishments such as those of petitioners, which necessarily carried large stocks of green, secondary, and cured, smoked, or refined products, such as lard, bacon, cured ham, etc., generally found it far more convenient to attempt no preliminary segregation of unprocessed hogs, but rather to pay a tax on all processing and receive the export drawback on the products ultimately exported.

[7] See, *e.g.*, *Economic Bases for the Agricultural Adjustment Act* (U. S. Dept. of Agriculture, 1933) p. 60; *Economic Situation of Hog Producers* (U. S. Dept. of Agriculture, Bureau of Agricultural Economics, 1933) in Sen. Doc. No. 184, 72d Cong., 2d Sess., p. 60. Since insurance charges and in many cases foreign tariffs were based on American export prices, the tendency would have been for the spread to exceed the amount of the tax.

Unquestionably, such was the consequence.[8] Any sale abroad, therefore, was made at the sacrifice of a sale in the domestic market where the price was higher by the amount of the tax.[9] That sacrifice was warranted by the promise that the differential would be made up by the export drawback; but the important fact is that every exporter was making that sacrifice and was making it upon the promise contained in Section 17(a).[10]

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[8] See, *e.g.*, *An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act* (U. S. Treasury Dept., 1937) pp. 3, 9, 27.

[9] Particularly was this true of hog products, the commodity upon which the export drawbacks here are sought. For several years after 1933 the pronounced domestic shortage guaranteed a ready domestic market for all of the relatively small proportion of such products which were exported. See, *e.g.*, *Livestock Under the AAA* (Brookings Institution, 1935) p. 242.

[10] No question of "passing on" or "bearing the burden" of the tax is involved. Whether petitioner did or did not is wholly beside the point. What is material is that petitioner sacrificed a higher *price* on the promise that the differential between that higher domestic price and the lower export price would be made up by the export drawback.

The actual sacrifice in dollars and cents may be seen from the domestic (Chicago) and world (Liverpool) prices of lard given in *Agricultural Statistics, 1937* (U. S. Dept. of Agriculture) p. 266, Tables 363, 364. For the year preceding the processing tax (November, 1932-October, 1933) the average price per hundredweight of lard in the world market was $1.03 *higher* than the domestic price. For the year during which the processing tax was at the $2.25 rate (March, 1934-February, 1935) the world price was *lower* than the domestic price by an average of $1.38. The net change was $2.41, which is almost exactly the amount of the tax when the conversion factor for lard (110) is applied. Since the $1.03 differential may be considered the normal margin necessary to enable an American exporter to pay costs of transportation and the like, it is apparent that every sale of lard abroad after the tax

Thus Section 17, both in theory and in practice, was a vital part of the whole Agricultural Adjustment program. The export drawbacks which it granted (or the complete exemption from tax granted by the bonding provision) was not solely a matter of fair dealing with taxpayers who would have to sell in competition with untaxed products. Nor was it an incidental Congressional gratuity. Section 17 was an integral part of the plan to reduce surplus stocks of agricultural commodities and it could and did operate only because exporters were assured that they would be compensated for the sacrifice which they made in not selling in the higher domestic market.

Congressional attitude toward Section 17.—The importance of Section 17, as well as the Congressional attitude toward it, is well illustrated by the events of 1935. During the spring of that year, injunctions against the collection of processing taxes had been increasing in number. By summer, they were in full flood—so much so that Congress felt it necessary to take some measures to prevent the total cessation of tax collections. On August 24, 1935, in the comprehensive Agricultural Adjustment Act amendments (49 Stat. 750) Section 21 was added. By Section 21(a) injunctions against the processing taxes were removed from the jurisdiction of the federal courts, and by Section 21(d), *infra,* p. 41, the principle was first laid down that no refund of processing taxes should be granted unless the claimant established that he had

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was imposed was made at a sacrifice of about $2.40, which had to be made up by the export drawback. This $2.40 represented almost one quarter of the average domestic price of the lard. Obviously, few exports would have been made had the promise of the drawback not been given.

borne the burden of the tax. That principle was continued in the Revenue Act of 1936.

Two facts are significant. The first is that the same law which added Section 21 also amended Section 17 to clarify and implement its provisions. Section 28, 49 Stat. 750, 770.[11] The second, and more important, is that Congress, recognizing that export drawbacks were normal and necessary parts of the taxing scheme, specifically exempted in Section 21(d)(1) claimants under Section 17(a) from the obligation to establish that the tax was not passed on. The export drawbacks under Section 17(a) and the processing in bond for export purposes were continued throughout the period of the Agricultural Adjustment Act.

When Section 21(d) was enacted, in 1935, this Court had not yet handed down its decision in *United States* v. *Butler*, 297 U. S. 1. After that decision it became apparent that a more comprehensive statute was necessary to deal with the question of unconstitutionally exacted processing taxes. That need was met in the Revenue Act of 1936. The relevant provisions of that Act are discussed at length at pp. 16-29, *infra;*

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[11] Until the amendments of Section 17 by Section 28 of the 1935 amendatory act, export drawbacks were payable only on products processed "wholly or in chief value" from a taxed product. Section 28 changed the language to "wholly or partly". Until the 1935 amendments, no drawbacks were allowed unless proof was given that the tax had been paid, and refunds only could be made. Section 28 eliminated the necessity of proof of payment, and allowed a credit of taxes which were payable. In addition, Section 28 clarified the statutory language with respect to the person to whom the drawback was to be paid by providing that payment of the export drawback should be made to the exporter, unless he waived payment, in which event it was to be paid to the processor of the products.

here it is enough to note that Title VII contained an amplified and, to some extent, clarified version of Section 21(d), and continued its basic philosophy that refunds of processing taxes illegally collected would be made only if the claimant could demonstrate that he bore the burden of the tax. The mechanics by which that proof was to be made were spelled out at length. In addition, by Title IV, certain sections of the old Agricultural Adjustment Act were reenacted, including Section 17(a).

The export drawbacks which petitioner claims are, it must be remembered, due to petitioner irrespective of the validity of the Agricultural Adjustment Act. No claim is made based upon the decision in the *Butler* case. The export drawbacks are thus wholly different from the claims for processing taxes illegally collected due to the invalidity of the Act—the claims which it was the purpose of Congress to deal with in 1935 in Section 21(d) and in 1936 in Title VII of the Revenue Act. Petitioner claims only the amounts which were assured it by Section 17(a) of the Act, now reenacted (if that were necessary following the *Butler* case) by Section 601(a) of the Revenue Act of 1936.

Having in fact during 1934 and 1935 exported and sold certain hog products abroad—necessarily at the world price which reflected the drawbacks promised in Section 17(a)—petitioner filed, in due course, its claims for refund for the amount of the export drawbacks. For some time its claims were paid, but beginning in August, 1935, no further payments were made. The claims here involved were filed with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with the regulations prescribed by the Commissioner of Internal Revenue (R.

1-2).[12] Each of the claims was rejected (R. 2), and this suit was begun in the Court of Claims.

The Government, on September 5, 1939, moved to dismiss the petition on the ground that petitioner could recover only by meeting the requirements prescribed by Title VII of the Revenue Act of 1936 (R. 10). On December 4, 1939, the court below rejected that argument, as every other court had done, and held that petitioner was entitled to its drawback payments (R. 11-14). It concluded, however, that it was powerless to grant relief, and that the petition must be dismissed because the court was without jurisdiction under Section 601(e) of the 1936 Act, *infra*, p. 43. This decision was rendered notwithstanding the point had been specifically disclaimed by the Government's brief. The Government being still unwilling to pay to petitioner the drawbacks to which it was held entitled under every court decision, the petition for certiorari was filed and the writ granted on April 22, 1940 (R. 19).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that Section 601(e) of the Revenue Act of 1936 deprived it of jurisdiction to entertain these actions.

2. In not holding that petitioners were entitled to recover the amounts set out in their claims for refund.

3. In dismissing the petitions.

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[12] The details of the claims are set out in Exhibit A to each of the petitions, which, by stipulation (R. 15-18), have not been printed in the record in this Court. They are contained, however, in the certified record on file with the Clerk.

SUMMARY OF ARGUMENT

I

Petitioners seek to recover export drawbacks assured to them by Section 17(a) of the Agricultural Adjustment Act, reenacted in Title IV, Section 601(a) of the Revenue Act of 1936. Their claim is resisted by the Government on the ground that Section 601(b) of the Revenue Act of 1936 forbids the payment of export drawbacks to exporters who were also taxpayers and that petitioners' sole remedy is under Title VII of that Act.

Both Title IV and Title VII deny the Government's contention. Section 601(a) of Title IV expressly commands the payment of export drawbacks in accordance with Section 17(a). Section 911 of Title VII makes that Title inapplicable to refunds under Section 17(a). Moreover, construed as the Government would construe it, Section 601(b) attributes to Congress an intention to avoid its promise contained in Section 17(a), to penalize petitioners because they relied on that promise, to change its position completely from that which it had adopted the year before in enacting Section 21(d) of the Agricultural Adjustment Act, and to withdraw what it had expressly granted in subsection (a) of the same Section 601.

Every court, including the court below, thus far has rejected the Government's contention. Section 601(b) has been construed as simply a correlative to Section 911; the former making relief under Title IV inapplicable to taxpayers seeking recovery of taxes upon the ground of illegality, and the latter making relief under Title VII inapplicable to claims for drawbacks and the like.

The construction which has heretofore been adopted by the courts avoids the inequity and inconsistency of

that urged by the Government. In addition, it is supported by the legislative history of the bill and by the fundamental inapplicability of Title VII to claims for export drawbacks. Finally, the Government's construction creates serious constitutional doubts as to the validity of Section 601(b) which can and should be avoided.

II

Although the court below decided that petitioners were entitled to recover, it also decided that Section 601(e) denied it jurisdiction to grant a refund. That point had not been urged in the court below, and consequently petitioners had had no opportunity to demonstrate the inapplicability of that section.

The general jurisdiction of the Court of Claims is not in question. And, properly construed, Section 601(e) does not limit that general jurisdiction, with respect to claims of this nature, to determine whether the Revenue Act, properly construed, places claims of this character under Title IV or Title VII. It does, on the other hand, make final the determinations of the Commissioner on such matters as findings of fact, computations and the like.

Thus construed, Section 601(e) has a wide field of operation, since the computation of refunds under those sections reenacted in Section 601(a) may involve many complicated and controversial questions. Thus construed, however, Section 601(e) does not forbid the Court of Claims to determine whether a claim for refund of export drawbacks can be considered under Title IV or must be considered under Title VII.

This construction of Section 601(e) is supported by the language of the section; by its striking dissimilarity to other sections in the same statute denying any juris-

diction whatever to the courts; by numerous decisions construing similar provisions in other statutes; by the well-settled canon of construction against nullifying existing rights through the device of removing their enforcement from the courts; and, finally, by the fundamental inconsistency of such a denial of judicial relief with the whole scheme of the Revenue Act of 1936 with respect to claims arising out of the Agricultural Adjustment Act.

ARGUMENT

I

PETITIONER IS ENTITLED TO THE EXPORT DRAWBACKS UNDER SECTION 17 (a), AND IS NOT REQUIRED TO PROVE ITS CLAIM UNDER TITLE VII OF THE REVENUE ACT OF 1936

The present case may be very easily summarized: Congress, as an integral part of a general plan to assist agriculture, set up in Section 17 of the Agricultural Adjustment Act a system of export drawbacks (and processing under bond) with the purpose of allowing processed goods to be sold in foreign markets tax-free. That system of export drawbacks persisted throughout the life of the Act. In reliance on it, petitioners made sales at the lower world price instead of at the higher domestic price. In 1935, when Congress felt it necessary to limit the right to refund of processing taxes, it specifically recognized in Section 21 (d) the inapplicability of such limitations upon refunds to the export drawbacks under Section 17. Indeed, the continued operation of Section 17 was specifically recognized by the 1935 amendment and its field of operation enlarged in that Act. The sole question here is whether the Revenue Act of 1936, passed less than a year later, should be construed as a complete *volte face* by Congress, so

as to impose upon claims for export drawbacks the same requirements which Section 21 (d) had imposed in 1935, and which Title VII of the 1936 Act now imposes, upon claimants seeking recovery of processing taxes solely upon the ground of *illegal* collection under *United States* v. *Butler*, 297 U. S. 1.

Petitioners' claim is unaffected by the legality or illegality of the Agricultural Adjustment Act. In fact, had no questions ever been raised as to the legality of the Act, the Government would have undoubtedly continued to return to petitioners the export drawbacks for which they are now forced to resort to court action. Moreover, had petitioners chosen to follow the practice of processing under bond pursuant to Section 17 (b), they would never have paid any taxes whatever on the exported products here involved. From this point of view, the question in this case is whether the Revenue Act of 1936 should be construed to *penalize* petitioners because the Agricultural Adjustment Act was held *unconstitutional*, and to *penalize* petitioners because for various business reasons (wholly divorced from Government fiscal policy) they chose to pay the processing tax upon a Congressional assurance that it would be returned to them upon the export of the processed products instead of executing, without payment of taxes, a bond which would have been automatically discharged by the proof of export. See Internal Revenue Regulations 83, Article 15. We submit the statute clearly indicates that no such *volte face* or penalty was intended. This has been the *unanimous* holding of the lower courts, including the court below (R. 14); *Cudahy Bros. Co.* v. *La Budde*, 92 F. (2d) 937 (C. C. A. 7th, 1937), *certiorari denied*, 303 U. S. 659; *Neuss, Hesslein & Co., Inc.*, v. *United States*, 30 F. Supp. 595 (S. D. N. Y., 1939).

Petitioners' claims, as the petition indicates, are based upon Section 17 (a) of the Agricultural Adjustment Act under which petitioners admittedly became entitled to export drawbacks in the amount of the processing taxes previously paid when they exported the processed products. In *Campbell* v. *United States*, 107 U. S. 407, 411, this Court characterized a statute similar to Section 17 (a) as creating—

> . . . a contract that when exported the government would refund, repay, pay back, this amount as a drawback. . . .

We turn, then, to the 1936 Revenue Act to see whether this contractual and moral obligation upon the faith of which petitioners have acted has been ignored.

One would expect the answer to be given in Title IV of that Act, which is entitled "Export, Charitable, etc., Refunds and Floor Stocks Adjustment under Agricultural Adjustment Act". That expectation is realized in Section 601 (a), which states, in words which admit of no doubt, that Congress recognized the obligation and that it is to be discharged:

> (a) The provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16(e)(3), and 17(a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only *for the purpose of allowing refunds in accordance therewith in cases where* the delivery for charitable distribution or use, or *the exportation,* or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16(e)(3)), *took place prior to January 6, 1936.* (Italics supplied.)[13]

The purpose of the section is abundantly clear. The decision in the *Butler* case had left the validity of the

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[13] Petitioners' claims are limited to goods exported prior to January 6, 1936 (R. 1).

whole Agricultural Adjustment Act under a cloud. The Commissioner of Internal Revenue was doubtful whether even Section 17 (a) remained in effect to give him statutory authority to pay the export drawbacks. Congress resolved that doubt by reenacting Section 17 (a) and instructing him to make the payments contemplated by that section "*in accordance therewith.*" Both the House and Senate reports on the Act state in similar language (H. Rep. No. 2475, 74th Cong., 2d Sess., p. 13; Sen. Rep. No. 2156, 74th Cong., 2d Sess., p. 27):

> . . . The enactment of this section will serve to remove doubts as to the legal authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which have existed since the decision of the United States Supreme Court holding the Agricultural Adjustment Act invalid, to continue the making of refunds under the provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16(e)(3), and 17(a) of that Act, as amended.

The intention of Congress to fulfill its contractual obligations under Section 17 (a) is equally clear if we look not at Title IV, but at Title VII. In the court below and in other courts the Government has contended, albeit always unsuccessfully, that petitioners or those in like position must prove under Title VII that they had not passed on the burden of the tax. The promise of Congress is ignored. The reliance upon that promise, not only in selling abroad at the sacrifice of a higher domestic price but also in paying the tax instead of executing a bond, is ignored. The position of Congress a year before in Section 21 (d) in specifically exempting export drawbacks from the requirements of a suit for refund based on illegality, is ignored. The Gov-

ernment contends simply that Congress disregarded its promise, closed its eyes to the inequitable results which would follow, abruptly changed its position of a year before, and imposed upon petitioners the fundamentally inapplicable requirements of Title VII.

Title VII carries its own denial of such an intention. Section 911 (part of Title VII) provides:

> The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of Section 317 of the Tariff Act of 1930. . . .

As plainly as words permit, Congress has reenacted in virtually identical language the provision contained in Section 21 (d), *infra,* p. 41, specifying that proof of the ultimate incidence of the tax is unnecessary where the claim is for export drawbacks. This language in the 1935 amendment, the Government will admit, required export drawbacks to be paid to petitioners without proof of bearing the burden of the tax.

Thus, both Title IV and Title VII contain a plain denial of the intention of Congress to avoid its promise, to penalize petitioners because they relied on that promise, and completely and inexplicably to change its mind. Nonetheless, the Government insists that Congress had such an intent. Its argument is based solely upon Section 601 (b). That section provides, in part, as follows:

> (b) Except for refunds under Section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. . . .

This sentence in subsection (b), the Government urged below, denies to petitioners the refund expressly granted them by subsection (a). We believe that the evidence is clear that Congress did not intend that to be the meaning of the sentence, particularly since that meaning raises very serious constitutional questions.

Before we proceed to an analysis of the Government's contention, we wish to be sure that this Court appreciates—as all the lower courts have—that the Government's construction of the statute results in not only a thoroughly inequitable result, but also in a logical absurdity. It requires a decision that Congress, in subsection (a) of Section 601, consistent with its original plan and with Section 21 (d) of the 1935 Act, provided for the fulfillment of its promise to pay export drawbacks, and then, in subsection (b) of the same section, enacted at the same time, revoked its act. As the Circuit Court of Appeals remarked in *Cudahy Bros. Co.* v. *La Budde,* 92 F. (2d) 937, (C. C. A. 7th, 1937), 938, *certiorari denied,* 303 U. S. 659:

> To our minds it could not have been the intent to provide specifically in subsection (a) for preservation of the remedy for drawback in case of exportation and then immediately following, by subsection (b), to provide that the remedy specifically recognized by subsection (a) was abolished.

The Government's argument has, in fact, always been readily answered by the interpretation which makes for consistency and equity rather than the one which makes for absurdity and inequity. In the *Cudahy* case, *supra,* for example, the court concluded that the sentence in subsection (b) had reference not to processor-exporters claiming export drawbacks, but rather to processors who claimed a refund solely upon the ground

of illegality of the tax—that is, that the sentence is simply intended to foreclose any attempt by a processor not entitled to a drawback to recover the amount of tax paid on goods subsequently exported on the ground that the tax was illegally levied under *United States* v. *Butler*. By the same token, it has no application to an exporter in the position of petitioners who claims export drawbacks as an exporter, and whose claim is in no degree dependent upon the illegality of the tax. The same construction of the sentence in subsection (b) was adopted in *Neuss, Hesslein & Co., Inc.* v. *United States*, 30 F. Supp. 595 (S. D. N. Y., 1939), and in the court below (R. 13).

Inequity and absurdity are thus avoided. The exporter (consignor) who had sold abroad in reliance on the promise contained in Section 17(a) was always to be paid the export drawback which Congress had assured—irrespective of whether such exporter (consignor) had or had not been the original taxpayer. On the other hand, as to taxes paid on products later exported, the original processor grounding his claims on the constitutional invalidity of the tax was to be in no better position than one who processed for the domestic market. The sentence in subsection (b) of Section 601 is simply the correlative in Title IV of Section 911 in Title VII. Each of them was inserted to make clear that claims based upon export and the like were to be paid under Title IV and that claims based upon illegal collection were to be subject to the requirements of Title VII. As the court below states (R. 13):

> The only purpose of the sentence was to make it plain that processors who are not exporters were not to have the benefit of that section, but were to be confined to the relief provided for processors as such.

This construction of the sentence is also indicated by the statement in the House Report (H. Rep. No. 2475, 74th Cong., 2d Sess.). In referring to Section 601 (b), which then consisted solely of the sentence in question,[14] the report states (p. 14) that these "processors" are excluded because—

> the claims of such persons are within the provisions of Section 21 (d) of the Agricultural Adjustment Act, as amended.

As we have pointed out above, Section 21 (d) applied only to claims for *refund* based upon *illegal* collections, and specifically did *not* apply to export drawbacks. The "processors" in Section 601 (b), therefore, were not intended to include claimants for export drawbacks, because the language of Section 601 (b) was intended to have the same scope as Section 21 (d) to which the processors were remitted.

Nor does the Senate Report indicate a purpose to change the scope of Section 601 (b) (Sen. Rep. No. 2156, 74th Cong., 2d Sess.). Title VII was added to the bill, and Section 601 (b) was expanded to include other matters. The sentence in question was retained, however, with the comment (p. 28) that the claims of such "processors" were included in Title VII. Since Title VII was but a clarifying and elaborating substitute for Section 21 (d) (see Sen. Rep., *supra*, pp. 32-34), the Senate comment indicates, as the House comment plainly states, that "processors" in subsection (b) of Section 601 meant those who were originally remitted to Section 21 (d) and now are remitted to Title VII—

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[14] The proviso in the sentence relating to Section 15(a) was added by the Senate. Otherwise the House Report is directed to a provision identical with that which ultimately became law.

those who sought refunds of processing taxes on the grounds of *illegality*. The indication in the Senate report becomes a certainty when it is recalled that Section 911 of Title VII, in practically the language of Section 21 (d), states that it shall not apply to the payment of export drawbacks.[15]

A further and important factor which should be considered in appraising the Government's construction of Section 601 (b) as remitting petitioners to Title VII, is the fundamental inapplicability of that Title to export drawback claims. Title VII sets up a procedure, and certain presumptions, for determining the ultimate incidence of the processing tax. Recovery is granted only to the extent that the claimant "bore the burden" of the tax. Section 902. But, as we have pointed out above, p. 7, the question involved here is not a question of who "bore the burden". Unquestionably, petitioners "bore the burden", but in a different sense: petitioners sold abroad at a price lower than the domestic market price by almost exactly the amount of the tax (see p. 7, *supra*). They did so upon the assurance that Congress would make up the difference by a

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[15] There is an ambiguous sentence in the Senate report which is frequently cited by the Government. Referring to Section 911, which states categorically that Title VII does not apply to export drawbacks, the report states (p. 37) that the Section does not deny to processors who have exported goods the benefits of Title VII "since such processors are, with one minor exception, not entitled to the benefits of Section 601 of Title IV." Certainly this sentence in the report cannot have the effect attributed to it by the Government—to make claimants for export drawbacks subject to Title VII—since that gives Section 911 a meaning exactly opposite from what it says in so many words. The sentence in the report referring to "such processors" undoubtedly refers to processors seeking refunds of taxes on the ground of *illegality*.

drawback.[16] Indeed, Congress *wanted* petitioner to do just that. But Title VII takes into account no such manner of "bearing the burden" of the tax. The Title does not address itself to the possibility that the tax can be "borne" by selling in a foreign market at a price which does not reflect the tax. Neither Section 902, which lays down the conditions for refund, nor Section 907, which deals with the problem of evidence and proof, adverts to such a situation. The Title simply was not designed to deal with claims for export drawbacks which do not depend on the invalidity of the tax. The Title *is* designed to rationalize the *refunds* of taxes claimed solely on account of *illegality* of collection. Indeed, the reference to refunds pursuant to "court decisions" in Section 902 carries that clear implication. See *Cudahy Bros. Co.* v. *La Budde, supra,* 92 F. (2d) at p. 939.

We believe, therefore, that for these various reasons the sentence in Section 601 (b) cannot have the effect ascribed to it by the Government—of remitting exporters who happen to be also taxpayers to Title VII. But if a further basis for rejecting the Government's argument be necessary, a final and conclusive answer is that it raises a very serious question as to the constitutionality of the sentence in Section 601 (b). If any other reasonable construction is possible—and the construction already adopted by three lower courts is certainly possible—that constitutional question should be avoided. *Wright* v. *Vinton Branch Bank,* 300 U. S. 440, 461; *Crowell* v. *Benson,* 285 U. S. 22, 62; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; *Blodgett* v. *Holden,* 275 U. S. 142, 148.

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[16] Petitioner also sacrified the full amount of the tax by relying on the export drawback in Section 17(a) instead of processing under bond pursuant to Section 17(b).

The constitutional objection to the Government's argument is a fundamental one, and it can be stated very simply: Petitioners unquestionably acquired by the export of processed goods, contract rights against the United States for the return of such taxes as were paid with respect to those exported goods. *Campbell* v. *United States*, 107 U. S. 407, 411; *Durant* v. *United States*, 28 Ct. Cls. 356, 366-368 (1893). The United States had made an offer in Section 17 (a)—to refund processing taxes on such products as were exported. The offer was accepted—certain products were exported, reliance being placed on the offer to the extent that the higher domestic market price was not availed of by petitioners. The obligation to refund the taxes thereupon arose. Every aspect of a completed unilateral contract exists. *Restatement, Contracts*, Secs. 12, 29, 52. *Williston, Contracts* (Rev. ed. 1936) Ch. V.

This contract right against the United States is protected by the due process clause, and cannot be annulled by Congress except in the exercise of its police power or some other paramount power. The rule is stated in *Lynch* v. *United States*, 292 U. S. 571, which holds invalid an attempt by Congress to abrogate existing War Risk Insurance contracts, and to relieve the United States from a contractual liability which it had incurred. This Court, in a unanimous opinion, stated (p. 579):

> As Congress had the power to authorize the Bureau of War Risk Insurance to issue them [contracts of war risk insurance], the due process clause prohibits the United States from annulling them, unless,

> indeed, the action taken falls within the federal police power or some other paramount power.

Many previous cases are cited to the same effect.

The only question, then, is whether, under the rule laid down in the *Lynch* case, the Government's interpretation of Section 601 (b), which would result in remitting petitioners to Title VII, would annul their contract rights. A brief analysis of the nature of the rights of petitioners, and of the scope of Title VII, shows that such an annulment would be the inevitable consequence of the Government's argument.

Petitioners, here, have *two* rights. By the fact of *payment* of the illegal processing taxes, petitioners acquired rights to recover the portion of those amounts which they had paid representing the extent to which they in fact "bore the burden" of the tax. *In addition* to that right, by the fact of *export,* petitioners acquired under Section 17 (a) rights based upon a contract with the United States.

This latter right—the contract right—is independent of the right based upon illegality of the tax. The rights came into existence at different times—the right to refund because of illegality arose at the time the tax was paid, and the contract right arose at the time of export, a later time, and perhaps a much later time. The two rights have a wholly different foundation—one rests upon the Constitution (*United States* v. *Butler,* 297 U. S. 1), and the other rests upon the promise contained in Section 17 (a). The two rights are for wholly different amounts—the right based upon illegality of the tax is the right to recover no more than the amount of the burden of the tax which petitioners

bore (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337). The contract, on the other hand, entitled petitioners to the full amount of the processing taxes paid with respect to the exported products, for only by offer of a full repayment could Section 17 (a) parallel Section 17 (b), and only by that offer could Congress accomplish the purpose it wished to accomplish—the preservation of our export trade.[17]

This independent contract right the Government's argument now seeks to destroy by remitting petitioners to Title VII. Plainly enough, that Title preserves to petitioners their rights based upon payment of an illegal tax, and is possibly, but as yet not certainly, a proper regulation of the procedure by which that right is to be enforced. *Anniston Mfg. Co.* v. *Davis, supra.* At the same time, it is equally plain that Title VII does *not* preserve petitioners' contract rights. Section 911 categorically forbids the consideration of export refunds under Title VII. The processor-exporter can recover under Title VII *only* as *processor*—as one who has paid an illegal tax. As an *exporter*—as one who

[17] Moreover, the method and basis of computation is wholly different. The right to recover illegally exacted taxes, to the extent the burden was borne, is measured by the amount of tax paid *per hundredweight* of hogs at the time of processing. The contract right to the drawback is measured, as of the time of export, by the conversion factor for the particular product. See *infra*, p. 32, note 19. This conversion factor was established by the Secretary *in advance* of export. It was necessarily an arbitrary figure for each product, taking into account the relative values of the resulting products and wastage in processing the taxed commodity. The amount computed by applying the conversion factors at the time of export would be only roughly related—depending on the type of product yield, etc.—to the amount of illegally exacted tax on the live hog originally processed. In determining export prices ex-tax the conversion factors established by the Secretary were used.

has a contractual right against the United States, he is remediless.

The Government may urge that a similar destruction of rights has been sanctioned by this Court in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, in which the Court held that Congress might forbid suit against the Collector of Internal Revenue for taxes collected under an unconstitutional statute if a fair and adequate remedy against the United States remained. In that case, however, the taxpayer had but a single right—to recover, under the Constitution, taxes which it had paid. Two remedies to enforce the single right were open at the time of payment—suit against the collector, or suit against the United States. The statute upheld in that case simply took away one of these remedies—the suit against the collector. As the Court stated (p. 343):

> The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right.

In the *Anniston* case, in other words, but *one right* was involved, and the question was solely one of remedies. The obligation of the Government was not denied or abrogated in any way. Here, on the contrary, *two rights* are involved. Under the Government's construction, one of them, a contract right against the United States, is annulled and avoided. The *Anniston* case does not sanction that result, and the *Lynch* case plainly condemns it.

Conceivably, the Government may also urge that no constitutional issue is presented by this construction of Section 601 (b) because the present case falls within the

exception stated in the *Lynch* case itself—that contracts may be annulled if the action is "within the federal police power or some other paramount power". 292 U. S. at p. 579. We do not question that the exception to the rule exists, but we deny that any paramount power can be urged to achieve the extremely inequitable and discriminatory consequences of annulling petitioners' contracts which we have already pointed out. See p. 15, *supra*.[18]

We submit, therefore, that Congress did not have the intent ascribed to it by the Government. All of the decisions recognize that the Government's position results

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[18] Compare the criticism made by the President in vetoing a bill by which, in similar fashion, one small group of taxpayers were singled out for the imposition upon them of a special burden. The President's veto message stated (H. Doc. No. 864, 76th Cong., 3d Sess.):

> The second proposal is that no duties collected prior to June 26, 1938, under paragraph 1115 (b) of the Tariff Act of 1930, shall be refunded, unless the claimant establishes that he bore the burden of such duties. No reason appears discernible why one small group of claims should be singled out for the imposition of such a requirement when no such condition is exacted from claimants for refund of duties erroneously paid under any other paragraph of the Tariff Act. . . .
>
> Since the effect of this proposal would be to introduce a palpable inequality of treatment as between claimants against the Government, I am impelled to disapprove the bill.
>
> FRANKLIN D. ROOSEVELT
>
> *The White House*, July 3, 1940.

Certainly no paramount necessities of national import support a discrimination. The Court should, if it is reasonably possible, avoid the construction of the statute urged by the Government which would have precisely the same result as that condemned by this veto message.

in the absurdity of granting a drawback in subsection (a) of Section 601 and taking it away in subsection (b) of the same section. All of the decisions recognize that the Government's position results in the serious and wholly irrational inequity of penalizing petitioners because they chose to rely on the promise contained in Section 17 (a) instead of utilizing a bond under Section 17 (b)—in fact, in penalizing petitioners because the statute was held unconstitutional, since had it been held valid, petitioners would unquestionably have been paid. All of the decisions recognize that the Government's position results in a remission of petitioners and like claimants to a procedure—Title VII—to which Congress said they were not to be remitted, and which is fundamentally inapplicable to the matter of export drawbacks. No reason has been shown why Congress should be assumed to have so completely and unreasonably shifted its position from that which it had adopted in Section 21 (d) in 1935. Finally, no doubt can exist but that if the Government's construction were to be adopted, a serious constitutional question would be raised. That question can be avoided by a construction which will avoid absurdity and inequity, and be consistent with the whole scheme of both the Agricultural Adjustment Act and the Revenue Act of 1936.

II

THE COURT BELOW ERRED IN DISMISSING THE ACTION ON THE GROUND THAT IT LACKED JURISDICTION

The court below agreed with petitioners that they were entitled to the export drawbacks which had been assured them by Section 17 (a), and that they were not to be remitted to Title VII of the Revenue Act of 1936. The grounds upon which the Government had resisted

the suit thereupon disappeared. Nevertheless, the court concluded that Section 601 (e), *infra*, p. 43, deprived it of jurisdiction to grant a refund, and required the dismissal of the bill. The point had not been raised in either the pleadings or the briefs, and no argument had been addressed to the court on the proper construction of the subsection. Had there been, we believe that the court would not have fallen into the error of construing the subsection as barring the present suit.

Although the basis of the judgment below is thus the jurisdictional issue, we have postponed it to this point for several reasons. The discussion in Point I demonstrates the complexity of the issue of statutory construction which is involved, yet it is necessary to have an understanding of that issue, and of the nature of the claim which petitioners assert, in order to determine the proper scope of Section 601 (e). Moreover, in the event that the Government be sustained in its contention under Point I that petitioners' only remedy is under Title VII, there will then be no necessity for this Court to pass upon the question now under consideration. However, if the Court is of opinion that petitioners are entitled to the export drawbacks which they claim, Section 601 (e) is no bar to their recovery.

Claims against the United States, even though they are contract claims, are of course subject to the rule that the sovereign may not be sued without its consent. *De Groot* v. *United States*, 5 Wall. 419, 432; *United States* v. *Babcock*, 250 U. S. 328, 331; *Lynch* v. *United States*, 292 U. S. 571, 581-582. Here, however, the consent to be sued has been given by Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250), which confers jurisdiction on the Court of Claims of actions against the United States for claims founded on con-

tracts express or implied. This general consent was plainly not affected by the Revenue Act of 1936. Compare *Lynch* v. *United States,* 292 U. S. 571, 583. The only question is whether Section 601 (e) is a specific provision which, even though the right of recovery exists, bars the remedy of suit to enforce it.

Section 601 (e) provides as follows:

> (e) The *determination* of the Commissioner of Internal Revenue *with respect to any refund* under this section shall be final and no court shall have jurisdiction to review *such determination.* (Italics supplied.)

We believe that this subsection means that such matters as findings of fact, computations, and the like, are committed to the final determination of the Commissioner, but that it does not mean that a court is without jurisdiction to decide whether or not the denial of a claim for refund is fraudulent, or whether or not a person is, as a matter of law—of construction of the statute—entitled to have the Commissioner determine whatever rights may be due to him under the section. Such a construction of the subsection is both reasonable and in accord with the obvious intent of Congress.

There is still a wide area in which the statute may operate. Determination of the amount of an export drawback, for example, is not a simple matter of mathematics, even though the conversion factors were fixed by the Act. Section 603. Products which are exported are entitled to export drawbacks under Section 17 (a) whether they are processed "wholly or partly" from a product upon which a processing tax has been paid. Intricate questions of fact must be determined in order to fix the amount of draw-

back due.[19] Similar problems, equally complex, are presented for the determination of the Commissioner in order to determine the proper amount to be refunded

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[19] For example, in the case of wheat products which had been exported, the Commissioner of Internal Revenue had, in the conversion factor, merely the percentage of the per bushel processing tax on wheat with respect to one hundred pounds of an article processed wholly or partly from that commodity. He was still faced with the necessity, in order to apply the correct conversion factor, to determine whether the product, for example, flour, was whole wheat or graham, was a farina, or (dependent upon ash content) was to be classified as bran. The conversion factors for these products alone ranged from 0.0 to 234.7 per cent of the tax. Similar variations requiring detailed factual determination occurred for prepared flour, cereal preparations, bread and other wheat products. Similar problems were presented in the case of cotton. Conversion factors for cotton products left open the determinations whether a particular product fell within one of over a hundred classifications (*e.g.*, flannelette toweling, Osnaburg, print cloth, sateen, tire fabric, velveteen, voile, etc.) and as to whether each classification was bleached or unbleached, colored or uncolored, mercerized or unmercerized, etc. Each of these variables made for a change in the applicable conversion factor and the amount of the export drawback.

The same problems, of course, are left for the decision of the Commissioner in connection with export drawbacks on hog products such as those involved here. The Commissioner has to ascertain the precise classification of the product among some thirty-six or more possible cuts of pork, and on the basis of whether the particular cut was fresh, frozen, in cure, barrelled dry, pickled, or smoked, or cooked in either dried or canned form. The conversion factors varied from 0.0 to as high as 292 per cent of the processing tax on hogs per pound of product, depending on that determination. For example, in the case of regular ham, if exported dry salted, the conversion factor would be 194 per cent; if pickled, 184 per cent; if smoked, 206 per cent; if cooked and dried, 242 per cent. Obviously the Commissioner's determination as to where any particular exported ham fell was properly made final.

under other sections reenacted by Section 601 (a), which deal with deliveries for charitable distribution, floor stocks tax adjustments made necessary by change of processing tax rates, and remission of taxes which unduly burden any commodity.[30] Indeed, the terms of Section 601 (d), *infra*, p. 42, which make the Commissioner's "findings of fact" and "mathematical calculation" binding on other government officers and employees indicate the Congressional appreciation of the complexities of the problems presented.

Absent such a provision as that contained in subsection (e), all of these questions would have been reviewable judicially, with the obvious likelihood that comprehensive and complex questions would have been presented in every case. Compare *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 560. That result Congress undoubtedly wished to avoid. It did so by making the determination of the Commissioner final "with respect to any refund under this section" both with respect to other governmental agencies (Section

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[30] *E.g.*, with respect to products delivered for charitable distribution or use, the determination required checking of the date of delivery, the name of the charitable organization, the specific distribution or use made of the product (refunds being controlled by such use and not merely by the character of the organization), the net weight of the product on the basis of its taxed and untaxed content, the month and year in which it had been processed, the applicable tax rate at such time, etc. See P. T. Form 24-C. The claims under Section 15(a) with respect to bags, required data as to sacking capacity in numerous poundage classifications, actual weight of bags, whether paper, jute or cotton, whether multiwall, coated, open-mesh, etc., and inventories at specific time intervals, whether, in the case of cotton bags, the fabric was calendered, or bleached, or colored, etc., and the sources of the cotton content (lint, card strips, comber waste, etc.) segregated by weight, etc. See P. T. Forms 24-A and 24-B.

601 (d)) and with respect to the courts (Section 601 (e)).

The subsection, thus interpreted, has a plainly defined and reasonable sphere of action. Moreover, there are several reasons for believing that Congress intended that to be its meaning.

1. The language employed in the subsection indicates that Congress was not removing from the jurisdiction of the courts the decision on whether a claim for refund of a particular character can be considered under Title IV or Title VII—a question which is wholly one of the interpretation of the statute. The Commissioner's insistence that petitioners, by the statute, were remitted to Title VII is not a "*determination with respect to any refund under this section*"; it is only a denial that petitioners' claim may even be considered.[21] That denial is not a determination with respect to a refund "under" the section at all. On the other hand, once the Commissioner accepts a claim for refund "under" the section, and proceeds to a determination of the merits of that claim, his determination of the amount due is not reviewable by the courts.[22]

2. Thus even considered by itself, the language of Section 601 (e) offers compelling evidence that Congress

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[21] The word "determination" itself would seem to imply a fact judgment on the merits of the claim, rather than a legal interpretation of the statute denying the right to make any claim at all.

[22] Even then, of course, Congress would not intend to exclude *all* judicial review. If the Commissioner's "determination" was tainted by fraud or other defect going to its *bona fides*, it would be subject to review on that ground by the courts. Compare *Dismuke* v. *United States*, 297 U. S. 167, 172; *Lloyd Sobaudo Societa* v. *Elting*, 287 U. S. 329, 339. Under such circumstances the "determination" would also not be "under" the section.

did not intend to deny jurisdiction to the courts in cases such as this. The evidence becomes practically conclusive, however, when one considers the marked contrast between the language of the subsection and provisions elsewhere in the same statute by which Congress unquestionably intended to deny any jurisdiction to the courts with respect to any aspect of certain claims for refund. For example, in Section 906 (a), *infra*, p. 45, (which is part of Title VII and thus inapplicable here, see pp. 17-29, *supra*), the Act states:

> (a) Notwithstanding any other provision of law, *no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court* for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. . . . (Italics supplied.)

Similar language is contained in Section 904. That language is clear: "no suit or proceeding . . . shall be brought." The language of Section 601 (e), on the other hand, simply imparts finality to the Commissioner's determination "with respect to any refund under this section". Certainly it is highly unlikely that Congress used the very different language of Section 601 (e) to accomplish the drastic result which the court below attributed to it, since had it intended *that* result, the language necessary to make that intention clear was ready to hand.

3. The construction of Section 601 (e) thus indicated by both the language of that section alone and by its striking dissimilarity to other sections of the same act, is further supported, if that be necessary, by a number of decisions in this Court. Each of them accords the

same construction to provisions similar to Section 601 (e) contained in other statutes. Indeed, that construction has become so well recognized that a strong presumption exists against the construction adopted here by the court below. The principle has been recently stated in *Dismuke* v. *United States,* 297 U. S. 167, 172:

> But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled.

In that case the statute authorized the Commissioner of Pensions to "adjudicate the claim" of the applicant, and also authorized an appeal to the Secretary of the Interior. In permitting judicial examination, nevertheless, the Court stated (pp. 172-173):

> This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it.

The same construction has been afforded other provisions dealing with the administration of veterans' affairs. In *United States* v. *Williams,* 278 U. S. 255, the statute provided that "the decisions [of the appropriate officers] . . . shall be final and conclusive". (See 278 U. S. at 257.) The Court refused to review the determination of the Director as to the facts, but stated the rule to be that the Director's action (pp. 257-258)—

> . . . is final, at least unless it be wholly without evidential support *or wholly dependent upon a question of law* or clearly arbitrary or capricious. (Italics supplied.)

See also *Silberschein* v. *United States,* 266 U. S. 221, 225.

The same rule applies in cases arising under the public land laws. In *United States* v. *Laughlin*, 249 U. S. 440, the Secretary of the Interior was required to repay excessive payments under the land laws when "it shall appear to the satisfaction of the Secretary" (see 249 U. S. at p. 442) that excessive payment had been made. The Court denied that the provision allowed the Secretary to determine wholly legal questions (p. 443):

> In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute, and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment . . . was a matter properly within the jurisdiction of the court of claims.

Medbury v. *United States*, 173 U. S. 492, 497-498 is to the same effect.[23] See also *McLean* v. *United States*, 226 U. S. 374; *United States* v. *MacVeagh*, 214 U. S. 124; *United States* v. *Hvoslef*, 237 U. S. 1; *Lloyd Sobaudo Societa* v. *Elting*, 287 U. S. 329; *United States* v. *Compagnie Générale Transatlantique*, 26 F. (2d) 195 (C. C. A. 2d, 1928).

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[23] In the *Medbury* case the statute required the Commissioner of the General Land Office to repay certain amounts paid for public lands when they were later found to be not within a railroad grant. The Court stated (pp. 497-498):

> If there were any disputed questions of fact before the Secretary, his decision in regard to those matters would probably be conclusive, and would not be reviewed in any court; but where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the court of claims has jurisdiction of such a case.

4. The construction of Section 601 (e) adopted by the court below also runs contrary to the well-settled canon of statutory interpretation that only clear and unequivocal language will compel the conclusion that Congress has nullified existing rights by removing from the jurisdiction of the federal courts actions by which those rights might be enforced. *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 80; *Lynch* v. *United States,* 292 U. S. 571, 586.[24]

5. Finally, as constructed by the court below, Section 601 (e) is contrary to the whole policy of Congress in dealing with the questions arising out of the decision in *United States* v. *Butler,* 297 U. S. 1. In no other aspect of the claims arising out of the Agricultural Adjustment Act has Congress completely denied judicial recourse to a claimant whose claim is refused *solely* by reason of an erroneous administrative construction of the statute. In the most important class of cases—those involving claims for refund of illegally exacted processing taxes—Congress categorically excluded direct action for their recovery from the jurisdiction of the courts but at the same time provided an alternative method *with appropriate judicial review. Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 343. In the other large class of cases—claims for refund of floor stock taxes—the questions raised may be taken directly to the courts upon denial of the claim by the Commissioner. Section 905. In fact, the basic purpose of the whole Revenue

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[24] It is not without significance that if subsection (e) bars the recovery of the amount which is due petitioners under Section 17 (a), it will be the first time, to our knowledge, that Congress has ever denied judicial relief to one to whom a refund of taxes is admittedly due. The possible exception, *Cary* v. *Curtis,* 3 How. 234, was immediately corrected by statute. Act of February 26, 1845, c. 22, 5 Stat. 727.

Act of 1936, insofar as it dealt with the adjustment of Agricultural Adjustment Act claims, was not to deny claimants an appeal to the courts to recover that to which they were entitled. Rather the Act was designed to substitute new methods of preliminary administrative adjustment and new limitations upon the amounts recoverable, and to preserve in all cases adequate judicial review of the administrative process. It would be strange indeed to conclude that Congress, for no apparent reason, intended to depart from that basic purpose with respect to this one minor class of claims—the validity of which is wholly unrelated to the constitutionality of the Agricultural Adjustment Act.

We submit, therefore, that the construction accorded Section 601 (e) by the court below is erroneous. All the evidence, intrinsic and extrinsic, denies that Congress intended to leave petitioners, if they are, as we believe we have demonstrated in Point I, entitled to the export drawbacks, wholly without judicial recourse to correct a mistaken legal conclusion by the Commissioner as to the proper construction of the statute.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed, and the cause remanded with instructions to overrule the motion to dismiss the complaint.

Respectfully submitted,

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October, 1940.

APPENDIX

PERTINENT PROVISIONS OF STATUTES

1. AGRICULTURAL ADJUSTMENT ACT OF MAY 12, 1933, C. 25, 48 STAT. 31, AS AMENDED, 48 STAT. 676, 49 STAT. 18, 770, 1739, 7 U. S. C. SEC. 617:

SEC. 17. (a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. In the case of rice, a tax due under this title which has been paid by a tax-payment warrant shall be deemed for the purposes of this subsection to have been paid; and with respect to any refund authorized under this section, the amount scheduled by the Commissioner of Internal Revenue for refunding shall be paid, any provision of law notwithstanding. In the case of sugar beets and sugarcane, this subsection shall be applicable to exports of products thereof to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam only if this title with respect to sugar beets and sugarcane is not made applicable thereto. The term "product" includes any product exported as merchandise, or as a container for merchandise, or otherwise.

(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or partly therefrom.

* * * *

SEC. 21(d)(1). No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

2. REVENUE ACT OF 1936 (JUNE 22, 1936), C. 690, 49 STAT. 1648:

Title IV—Export, Charitable, etc., Refunds and Floor Stocks Adjustment under Agricultural Adjustment Act.

SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

(a) The provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance there-

with in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)), took place prior to January 6, 1936.

(b) Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. No refund under this section shall be allowable to any person with respect to any articles where such person prior to January 6, 1936, paid an amount as tax under the Agricultural Adjustment Act, as amended, by taking as a credit against such amount an amount otherwise allowable as a refund with respect to such articles under sections 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), or 17 (a) of said Act. No refund under this section shall be allowed to any person except to the extent that he establishes that he has not received, and is not entitled to receive, reimbursement of such amount from the processor or other vendor with respect to the articles on which the claim is based. No claim under this section (except claims of processors under section 15 (a)) shall be disallowed on the ground that the tax with respect to the article or the commodity from which processed has not been paid.

(c) No refund under this section shall be made unless the claimant files a claim therefor prior to January 1, 1937, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and no claim shall be allowed in an amount less than $10. Sections 16 (g) and 21 (f) of the Agricultural Adjustment Act, as amended, are repealed.

(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employee, or agent of the United States.

(e) The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

(f) No interest shall be allowed in connection with any refund made under this section.

(g) Section 16(c) (1) of the Agricultural Adjustment Act, as reenacted by subsection (a) of this section, is amended by striking out "subsequent to June 26, 1934" and by inserting in lieu thereof "on or after June 1, 1934."

* * * * *

Title VII—Refunds of Amounts Collected under the Agricultural Adjustment Act.

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or

(3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the

date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more

than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an

officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpenaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpena, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings

and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has its principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the

cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during

the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) TAX PERIOD.—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) PERIOD BEFORE AND AFTER THE TAX.—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) AVERAGE MARGIN.—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) COMBINATION OF COMMODITIES.—Where, as, for example, in the case of certain types of tobacco,

the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) COST OF COMMODITY.—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) GROSS SALES VALUE OF ARTICLES.—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his

records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of

the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

SEC. 908. LIMITATIONS ON ALLOWANCE OF CLAIMS AND INTEREST.

(a) No claim shall be allowed under this title in an amount less than $10.

(b) No interest shall be allowed by the Commissioner or by any court with respect to any amount paid or collected as tax under the Agricultural Adjustment Act, except with respect to amounts, refund of which is made or allowed under this title.

SEC. 909. LIMITATIONS ON REVIEW.

In the absence of fraud or mistake in mathematical calculation, the findings of fact and conclusions of law of the Commissioner upon the merits of any claim presented under this title shall not be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

SEC. 910. LIABILITY OF COLLECTORS.

No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

SEC. 911. INAPPLICABILITY TO CERTAIN REFUNDS.

The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person.

* * * *

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amendments thereto adopted prior to January 6, 1936.

* * * *

LEGISLATIVE HISTORY

1. REPORT OF THE HOUSE COMMITTEE ON WAYS AND MEANS, H. REP. NO. 2475, 74TH CONG., 2D SESS., PP. 13-14.

Title IV. Refunds Under Agricultural Adjustment Act and Floor Stocks Adjustment.

It is the purpose of section 601 of this title to reenact into law certain sections of the Agricultural Adjustment Act, as amended, providing for refunds in certain cases. Section 601(a) reenacts these sections for the sole pur-

pose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16(e)(3)), occurred prior to January 6, 1936. The enactment of this section will serve to remove doubts as to the legal authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which have existed since the decision of the United States Supreme Court holding the Agricultural Adjustment Act invalid, to continue the making of refunds under the provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16(e)(3), and 17(a) of that act, as amended.

Section 10(d), is merely a general provision authorizing the Secretary of the Treasury to make necessary regulations to carry out the powers vested in him by the title of the Agricultural Adjustment Act.

Section 15(a) provides for the suspension by the Secretary of Agriculture and the refunding or crediting of the processing or compensating tax upon such amount of a commodity as the Secretary of Agriculture should by proclamation find is used in the manufacture of any class of products of such commodity which is of such low value, considering the quantity of the commodity used for their manufacture, that the imposition of the processing tax would prevent in whole or large part the use of the commodity in such manufacture, thereby substantially reducing consumption and increasing the surplus of the commodity.

Section 15(c) provides for the refunding or crediting to persons delivering any product to any organization for charitable distribution, or use, including any State or Federal welfare organization, for its own use, of any tax due or paid under the Agricultural Adjustment Act, with respect to the product so delivered, subject to certain prescribed conditions.

Section 16(e)(1) makes provisions for refunds or credits on floor stocks when the rate of the tax on the processing of any commodity generally or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, is decreased in the manner provided by the act. Section

16(e)(3) makes section 16(e)(1) applicable when the tax is suspended under section 15(a).

Section 17(a) makes provision for the refunding or crediting of processing taxes due and paid or due and payable on products processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable, upon the exportation of such product or commodity to any foreign country or to the Philippine Islands, Virgin Islands, American Samoa, the Canal Zone, or the Island of Guam.

Section 601(b) excludes from the benefits of the section the processor or other person who paid the tax with respect to the articles on which the claim is based, for the reason that the claims of such persons are within the provisions of section 21(d) of the Agricultural Adjustment Act, as amended.

* * * *

Section 601(d) is similar to the provisions of existing law relating to internal-revenue taxes which limit administrative review of the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of claims adjusted pursuant to this section to cases of fraud or mistake in mathematical calculation.

Section 601(e) makes the determination of the Commissioner of Internal Revenue with respect to any refund under this section final and not subject to judicial review, and section 601(f) disallows any claim for interest with respect to claims for refund made under this section. It is the opinion of your committee that, while provision for the relief of claimants in the cases covered by this section should be made, the fact that the refunds will be made to persons other than those who paid or were liable for the payment of the tax under the Agricultural Adjustment Act, as amended, and the present doubt as to the legal status of these claims warrants the disallowance of interest and the withdrawal of any right to judicial review of the determinations of the Commissioner.

* * * *

2. REPORT OF THE SENATE FINANCE COMMITTEE, SEN. REP. NO. 2156, 74TH CONG., 2D SESS.:

(pp. 27-28)

Title IV. Export, Charitable, etc., Refunds and Floor Stocks Adjustment under Agricultural Adjustment Act.

SECTION 601. REFUNDS ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

Your committee is in general agreement with the purposes of this title of the House bill, but proposes certain clarifying textual amendments and minor changes in substance, and several other amendments which it is believed will tend to simplify the administration of the title.

Section 601 of the House bill would reenact into law certain sections of the Agricultural Adjustment Act, as amended, viz., sections 10(d), 15(a), 15(c), 16(e)(3), and 17(a), for the sole purpose of allowing refunds in accordance therewith in cases where delivery for charitable distribution or use, or exportation, or the manufacture of large cotton bags, or a decrease in the rate of the processing tax (or its equivalent under Sec. 16(e)(3)), occurred prior to January 6, 1936. The enactment of this section will serve to remove serious doubts as to the legal authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which have existed since the decision of the United States Supreme Court holding the Agricultural Adjustment Act invalid, to continue the making of such refunds.

Your Committee recommends that section 601(a) of the House bill be amended by striking out the parenthetical clause beginning in the third line of the subsection. The purpose of this provision, it is believed, will be better subserved by the proposed amendment adding a new section, 603, to the title, which is discussed hereinafter.

Your Committee is of the opinion that the House bill should be amended by striking out section 601(d) and substituting a new subsection. This provision of the House bill would deny the benefits of the section to any processor or other person who paid the processing tax with respect to the articles on which a claim is based. The amendment recomended by your Committee would make an exception to this limitation in the case of refunds under section 15(a) of the Agricultural Adjustment Act,

as reenacted herein, to remove an inadvertent discrimination against a limited number of manufacturers of large cotton bags who are also processors of cotton yarn and to correct what would otherwise be an unfortunate competitive situation.

The claims for refund of other processors are adequately provided for by Title VII which your committee recommends be added as an amendment to the House bill. The second and third sentences of the proposed subsection (b) are intended to safeguard the interests of the revenue by denying refunds in cases in which credit against tax has previously been taken and allowed and cases in which the claimant does not establish that he has not received and is not entitled to receive reimbursement of the burden of the tax from the processor or other vendor. The last sentence of the subsection would operate to relieve claimants under section 601 (except processors claiming under Sec. 15(a) of the Agricultural Adjustment Act as reenacted therein) of the burden of proving payment of a processing tax with respect to the articles or commodities on which such claims are based. This change will accommodate section 601 to the provisions of section 602(e) relating to refunds to holders of floor stocks on January 6, 1936. It is believed the same rule should apply to both classes of claims and that the rule proposed will simplify and expedite their administrative disposition. The rule is not and should not be applied to claims of processors under section 15(a), since the validity of such claims necessarily depends upon tax having been paid.

* * * *

(p. 32)

Title VII. Refunds of Amounts Collected under the Agricultural Adjustment Act.

GENERAL STATEMENT

Your committee recommends the adoption of this title, as an amendment to the House bill, as necessary to the protection of the revenue and to the practical administration of a large and extremely difficult class of refund cases.

This title will introduce certain necessary provisions into the internal-revenue laws relating to a particular

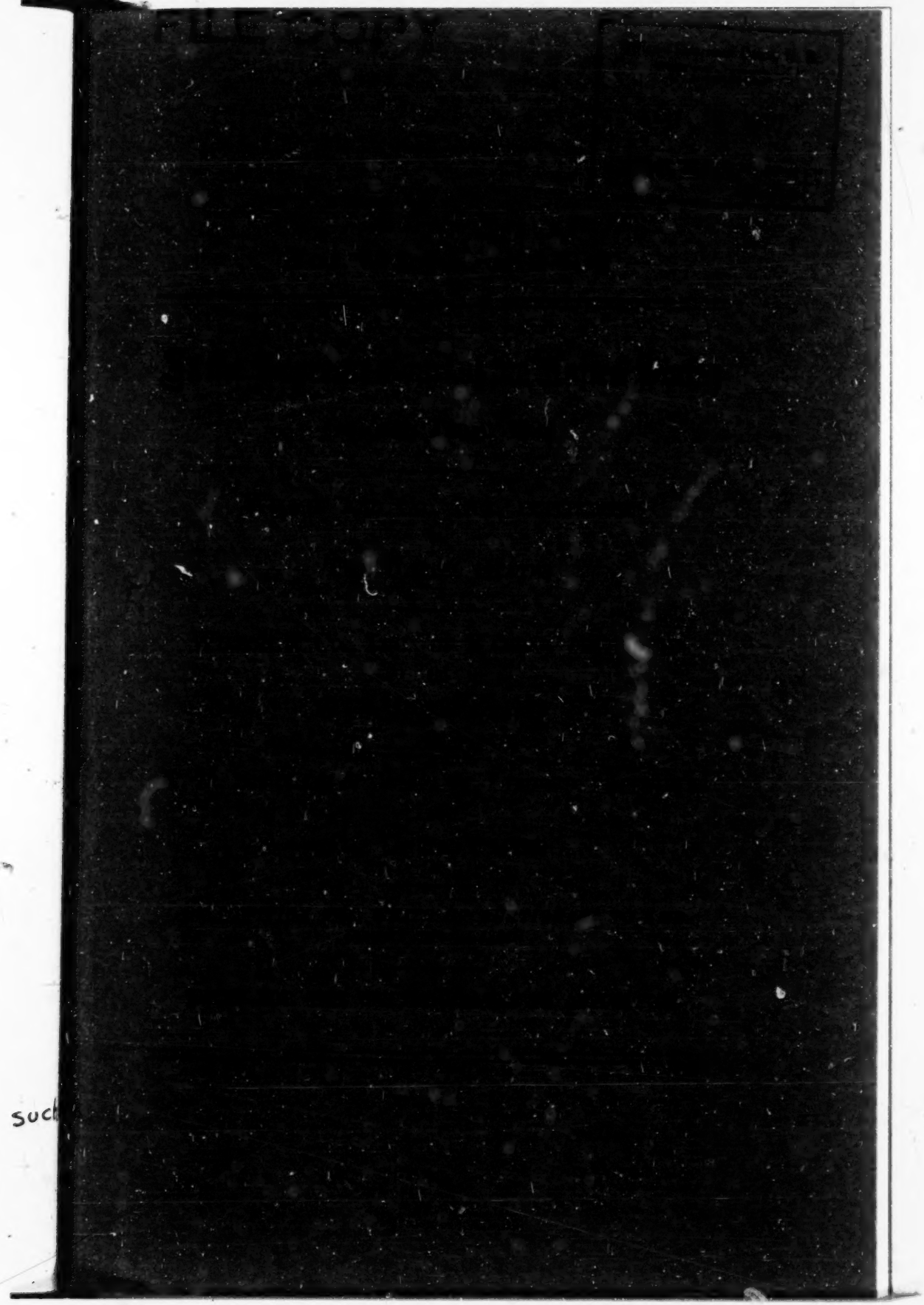
class of refunds. The provisions of the title relate to the making of refunds of amounts which have been collected under the Agricultural Adjustment Act. It is of the utmost importance that the provisions of section 21 (d) of the Agricultural Adjustment Act, which now deals with that subject, be revised, both from an administrative standpoint and to remove certain legal objections that have been urged with respect to that section.

NECESSITY FOR TITLE VII.

Title VII consists entirely of a revision of the provisions of section 21 (d) of the Agricultural Adjustment Act and related provisions. That section now provides that no recovery or refund shall be made or allowed of any amounts paid or collected under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue that he has borne the economic burden of the tax for which refund or recovery is sought. The Commissioner of Internal Revenue is required to give a hearing to each claimant and to find and declare of record whether or not the claimant has absorbed the burden of the tax. A transcript of such hearing must be made for use as a record in the case, if a court review of the Commissioner's action is desired.

(pp. 36-37)

Section 911 is designed to prevent two refunds with respect to the same amount collected under the Agricultural Adjustment Act. Section 911 also provides that the provisions of this title do not apply to export, charitable, and certain other refund claims, the adjustment of which is authorized by sections 15, 16, and 17 of the Agricultural Adjustment Act and section 601 of H. R. 12395. It is necessary to provide specifically that this title does not apply to such claims so that there will be no confusion between the provisions of this title and section 601 of H. R. 12395. It is not the intent of this section, however, to limit the rights of processors who have paid processing taxes on articles or commodities which they have themselves subsequently exported or delivered for charitable distribution or use to obtain refunds of such processing taxes subject to the requirements of this title, since processors are, with one minor exception, not entitled to the benefits of Section 601 of Title IV.



INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	7
Appendix	8

CITATION

Case:	
Cudahy Bros. Co. v. *LaBudde*, 92 F. (2d) 937, certiorari denied, 303 U. S. 659	4, 6
Statutes:	
Agricultural Adjustment Act, c. 25, 48 Stat. 31, Sec. 17, as amended (U. S. C., Title 7, Sec. 617)	8
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 601 (U. S. C. Supp. IV, Title 7, Sec. 641)	8
Sec. 602 (U. S. C. Supp. IV, Title 7, Sec. 642)	10
Sec. 901 (U. S. C. Supp. IV, Title 7, Sec. 623, note)	11
Sec. 902 (U. S. C. Supp. IV, Title 7, Sec. 644)	11
Sec. 903 (U. S. C. Supp. IV, Title 7, Sec. 645)	12
Sec. 905 (U. S. C. Supp. IV, Title 7, Sec. 647)	13
Sec. 906 (U. S. C. Supp. IV, Title 7, Sec. 648)	13
Sec. 911 (U. S. C. Supp. IV, Title 7, Sec. 653)	14
Sec. 913 (U. S. C. Supp. IV, Title 7, Sec. 655)	15
Miscellaneous:	
H. Rep. No. 2475, 74th Cong., 2d sess., pp. 13–14	6
Petition for certiorari in No. 823, Oct. Term, 1937	5

220259—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 778

WILSON AND CO., INC., PETITIONER

v.

THE UNITED STATES

No. 779

WILSON & CO., INC., OF KANSAS, PETITIONER

v.

THE UNITED STATES

No. 780

T. M. SINCLAIR & COMPANY, LIMITED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 11–15) is reported in 30 F. Supp. 672.

JURISDICTION

The judgment of the court below was entered December 4, 1939. (R. 15.) On January 10, 1940, the petitioners filed a motion for leave to file amended petitions, which was overruled on February 5, 1940. (R. 15.) The petition for writs of certiorari was filed March 1, 1940. (R. 18.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction to entertain a suit brought by an exporter for refunds of processing and floor stock taxes imposed by the Agricultural Adjustment Act.

STATUTES INVOLVED

The pertinent portions of the applicable statutes are set forth in the Appendix, *infra,* pp. 8–15.

STATEMENT

The court below decided these cases upon the petitions and motions to dismiss, filed by the Government. (R. 11.) From the petition in No. 778,[1] the following facts appear (R. 1–3):

The petitioner, a corporation, was engaged, during the period in controversy, in the preparation,

[1] Since the petitions in all three cases are almost identical, we have confined our statement to the facts presented in the petition in No. 778.

packing and selling of meat products, including hog products for foreign and domestic commerce. (R. 1.)

Subsequent to November 5, 1933, and prior to January 6, 1936, petitioner exported, in its own name, large quantities of hog products to foreign countries, upon which it had paid processing taxes and floor stock taxes. (R. 1.)

Petitioner alleges that the taxes so paid are refundable to it pursuant to the provisions of Section 17 (a) of the Agricultural Adjustment Act, as amended. (R. 1–2.)

Upon the exportation of the hog products, and prior to June 22, 1936, claims for refund of processing and floor stock taxes paid were filed by petitioner with the appropriate Collector of Internal Revenue. Each of the claims so filed was rejected by the Commissioner of Internal Revenue. (R. 2–3.)

Upon the foregoing facts, the Court of Claims held that it was without jurisdiction and dismissed the petition. (R. 15.)

ARGUMENT

These are suits brought in the Court of Claims by exporters to recover processing and floor stock taxes paid under the provisions of Section 9 (a) and Section 16 (a) of the Agricultural Adjustment Act, as amended. The suits involve taxes

paid prior to January 6, 1936, for which claims for refund were filed prior to June 22, 1936.

1. The principal controversy concerns the determination of the applicable statutory provisions governing the administrative and judicial procedure for obtaining refunds of taxes imposed by the Agricultural Adjustment Act. There are three possible alternatives:

(a) Title IV, Revenue Act of 1936; (b) Title VII, Revenue Act of 1936; (c) Section 17 (a), Agricultural Adjustment Act.

The court below held that the cases are governed by Title IV of the Revenue Act of 1936, *infra*, p. 8. If so, the determination of the Commissioner of Internal Revenue with respect to refund claims is final. Section 601 (e) of Title IV so provides, and further states that "no court shall have jurisdiction to review such determination." Accordingly, the Court of Claims properly held that it was without jurisdiction.

The holding that these actions are suits to recover drawbacks on exportation under Title IV, and not suits under Title VII, Revenue Act of 1936, *infra*, p. 11, for the refund of processing and floor stock taxes, is in accord with rather than in conflict with *Cudahy Bros. Co.* v. *La Budde*, 92 F. (2d) 937 (C. C. A. 7th), certiorari denied, 303 U. S. 659. In that case the Government demurred in the District Court upon the ground that the govern-

ing provisions were to be found in Title VII, and that under those provisions review of the Commissioner's determination might be had only before the Processing Tax Board of Review whose decision, in turn, was reviewable only by the circuit courts of appeals.[2] The District Court overruled the demurrer and the Circuit Court of Appeals affirmed, upon the ground that Title IV rather than Title VII was applicable. However, the Circuit Court of Appeals in the *Cudahy* case failed to note that the District Court had no power to entertain the suit even under Title IV, *for the jurisdictional question presented by Section 601 (e) was not raised.*[3] Accordingly, far from being in conflict with the *Cudahy* case, the present decision is in accord therewith since it holds that Title IV is applicable; the cases were disposed of differently only because of the application of certain provisions (Section 601 (e)) which were not raised in the *Cudahy* case. The decisions are therefore not in conflict.

---

[2] With regard to the floor stock taxes, it was alleged that the petitioner could not maintain the suit, inasmuch as it failed to allege compliance with Sections 902, 903, and 906 of the Revenue Act of 1936.

[3] The Government presented the point for the first time in its petition for certiorari, No. 823, October Term, 1937, and did contend there that if the question were governed by Title IV and not by Title VII, then under Section 601 (e) the court did not have jurisdiction.

Petitioners attempt to avoid the limitations of the 1936 Act upon the theory that these suits are based exclusively upon Section 17 (a) of the Agricultural Adjustment Act. But Section 17 (a) was reenacted by Section 601 of Title IV of the Revenue Act of 1936. The authority of the Commissioner to continue the making of refunds was thereby renewed.[4] However, Section 601 (e) made the Commissioner's determination final and it clearly precluded the Court of Claims from entertaining these suits.[5]

2. Petitioners urge the granting of the writs upon the additional ground that four thousand similar claims involving large sums of money are pending before the Bureau of Internal Revenue (Pet. 6). But the question is of considerably less importance now than it was two years ago when the Government unsuccessfully petitioned for certiorari in the *Cudahy* case on this very ground and when there were nearly twice as many claims outstanding involving about twice the aggregate amount of money. Moreover, even though there may still remain about four thousand claims, we are

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[4] H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 13–14. See also *Cudahy Bros. Co.* v. *LaBudde*, *supra*, p. 939.

[5] If certiorari should be granted in this case the Government reserves the right to make the contention made in the motions to dismiss, which is that Title IV of the 1936 Act relates only to exporters who are not processors; that Title VII relating to processors is governing as to exporters who are also processors, and that the present suits are not maintainable in the Court of Claims under Title VII.

informed that they involve only a relatively small number of taxpayers, so that it is unlikely that there will be very many independent suits based thereon.

CONCLUSION

The result reached by the court below is correct and no conflict of decisions has been shown. The petition should be denied.

Respectfully submitted.

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Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

MARCH 1940.

220259—40——2

APPENDIX

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by Section 12 of the Act of May 9, 1934, c. 263, 48 Stat. 670:

> SEC. 17. (a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product with respect to which a tax has been paid under this title, or of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid under this title, the tax due and paid shall be refunded. The refund shall be paid to the exporter or to the consignor named in the bill of lading under which the product is exported, as determined under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. * * * [U. S. C., Title 7, Sec. 617.]

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> TITLE IV—EXPORT, CHARITABLE, ETC., REFUNDS AND FLOOR STOCKS ADJUSTMENT UNDER AGRICULTURAL ADJUSTMENT ACT
>
> SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.
>
> (a) The provisions of sections 10 (d), 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for

the purpose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)), took place prior to January 6, 1936.

(b) Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. No refund under this section shall be allowable to any person with respect to any articles where such person prior to January 6, 1936, paid an amount as tax under the Agricultural Adjustment Act, as amended, by taking as a credit against such amount an amount otherwise allowable as a refund with respect to such articles under sections 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), or 17 (a) of said Act. No refund under this section shall be allowed to any person except to the extent that he establishes that he has not received, and is not entitled to receive, reimbursement of such amount from the processor or other vendor with respect to the articles on which the claim is based. No claim under this section (except claims of processors under section 15 (a) shall be disallowed on the ground that the tax with respect to the article or the commodity from which processed has not been paid.

(c) No refund under this section shall be made unless the claimant files a claim therefor prior to January 1, 1937, under rules and regulations prescribed by the Commis-

sioner of Internal Revenue with the approval of the Secretary of the Treasury, and no claim shall be allowed in an amount less than $10. Sections 16 (g) and 21 (f) of the Agricultural Adjustment Act, as amended, are repealed.

(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employee, or agent of the United States.

(e) The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

* * * * *

[U. S. C. Supp. IV, Title 7, Sec. 641.]

SEC. 602. FLOOR STOCKS AS OF JANUARY 6, 1936.

(a) There shall be paid to any person who, at the first moment of January 6, 1936, held for sale or other disposition (including manufacturing or further processing) any article processed wholly or in chief value from a commodity subject to processing tax, an amount computed as provided in subsection (b), except that no such payment shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

(b) The amount of the payment under subsection (a) shall be equal to the processing tax which would have been payable with respect to the commodity from which the article was processed, if it had been proc-

essed on January 5, 1936, but not in excess of (1) the amount of the burden of the tax with respect to the article which was shifted to the claimant in the price he paid for the article (to the extent that the claimant has not received and is not entitled to receive reimbursement for such burden from the processor or other vendor) and not in excess of (2) the amount of that part of the burden of the tax applicable to the articles held on January 6, 1936, which the claimant has not passed on to his vendees and has not included in the sale price of such articles. * * * [U. S. C. Supp. IV, Title 7, Sec. 642.]

TITLE VII — REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. [U. S. C. Supp. IV, Title 7, Sec. 623, note.]

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustmen Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor

reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. [U. S. C. Supp. IV, Title 7, Sec. 644.]

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth

under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. [U. S. C. Supp. IV, Title 7, Sec. 645.]

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases. [U. S. C. Supp. IV, Title 7, Sec. 647.]

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within

three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * *

* * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. * * * [U. S. C. Supp. IV, Title 7, Sec. 648.]

SEC. 911. INAPPLICABILITY TO CERTAIN REFUNDS.

The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to

the extent that refund or credit with respect to such amount has been made to any person. [U. S. C. Supp. IV, Title 7, Sec. 653.]

SEC. 913. DEFINITIONS.

When used in this title—

(a) The Term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

* * * * *

[U. S. C. Supp. IV, Title 7, Sec. 655.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Summary of Argument	3
Argument:	
I. The Court of Claims is without jurisdiction because petitioners' exclusive remedy is under Title VII	6
A. The legislative problem in 1936	7
B. Petitioners cannot obtain a refund under Section 17 (a) or Section 601	13
C. Petitioners' only remedy is under Title VII	27
II. Even if petitioners can claim under Title IV, the Court of Claims is yet without jurisdiction	31
Conclusion	36
Appendix	38

CITATIONS

Cases:

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	5, 8, 9, 24, 27, 28
Campbell v. *United States*, 107 U. S. 407	11, 25
Cudahy Bros. Co. v. *LaBudde*, 92 F. (2d) 937, certiorari denied, 303 U. S. 659	7, 16, 17
Dismuke v. *United States*, 297 U. S. 167	35
Durant v. *United States*, 28 C. Cls. 356	25
Kay v. *United States*, 303 U. S. 1	14
Lloyd Sabaudo Societa v. *Elting*, 287 U. S. 329	35
McLean v. *United States*, 226 U. S. 374	35
Medbury v. *United States*, 173 U. S. 492	35
National Lead Co. v. *United States*, 252 U. S. 140	20
Neuss, Hesslein & Co., Inc. v. *United States*, 30 F. Supp. 595	7, 16
Rickert Rice Mills v. *Fontenot*, 297 U. S. 110	9
Silberschein v. *United States*, 266 U. S. 221	35
Swan & Finch Co. v. *United States*, 190 U. S. 143	11, 20, 21, 22, 26
Thompson v. *United States*, 142 U. S. 471	24
Tide Water Oil Co. v. *United States*, 171 U. S. 210	22
United States v. *Allen*, 163 U. S. 499	11, 21, 25
United States v. *Butler*, 297 U. S. 1	4, 6, 7, 14, 21, 23, 36
United States v. *Compagnie Generale Transatlantique*, 26 F. (2d) 195	35
United States v. *Hudson*, 299 U. S. 498	26

Cases—Continued. Page

United States v. *Hvoslef*, 237 U. S. 1 35
United States v. *Laughlin*, 249 U. S. 440 35
United States ex rel. Parish v. *MacVeagh*, 214 U. S. 124 35
United States v. *San Francisco*, 310 U. S. 16 20
United States v. *Williams*, 278 U. S. 255 35
Welch v. *Henry*, 305 U. S. 134 26

Statutes:

Tariff Act of 1930, c. 497, 46 Stat. 590, Sec. 317 29
Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by Secs. 12 and 13 of the Act of May 9, 1934, c. 263, 48 Stat. 670, and by Sec. 28 of the Act of August 24, 1935, c. 641, 49 Stat. 750:
Sec. 9 8
Sec. 9 (c) 3
Sec. 15 (a) 8, 10, 12, 16
Sec. 15 (c) 8, 10
Sec. 15 (d) 8
Sec. 15 (e) 8
Sec. 16 8
Sec. 16 (a) 3
Sec. 16 (e) 8, 10
Sec. 17 ..... 4, 21, 23, 29
Sec. 17 (a) 3, 4, 5, 6, 7, 8, 10, 13, 14, 16, 22, 25, 27, 29, 31, 36, 38
Sec. 17 (b) 22, 39
Sec. 18 8
Sec. 21 (d) 17, 21, 39
Revenue Act of 1936, c. 690, 49 Stat. 1648:
Sec. 601 ..... 3, 5, 6, 7, 11, 12, 14, 19, 21, 25, 27, 29, 30, 31, 36, 40
Sec. 601 (a) 4, 6, 14, 15, 16, 30, 40
Sec. 601 (b) 4, 5, 6, 12, 15, 16, 17, 19, 20, 21, 31, 40
Sec. 601 (c) 41
Sec. 601 (d) 33, 41
Sec. 601 (e) 3, 6, 32, 33, 34, 35, 42
Sec. 601 (f) 42
Sec. 601 (g) 42
Sec. 602 ..... 11, 12, 19, 42
Sec. 602 (a) 19, 42
Sec. 602 (b) 42
Sec. 602 (h) 43
Sec. 602 (i) 43
Sec. 602 (j) 43
Sec. 901 43
Secs. 902–911 6
Sec. 902 ..... 9, 27, 30, 43
Sec. 903 ..... 27, 45
Sec. 904 ..... 27, 45
Sec. 905 ..... 10, 28, 46

Statutes—Continued.

Revenue Act of 1936, c. 690, 49 Stat. 1648—Continued. Page

Sec. 906 ..... 10, 27, 28, 46
Sec. 906 (a) 28, 34, 46
Sec. 906 (b) 46
Sec. 906 (g) 46
Sec. 907 ..... 10, 11, 23, 28, 47
Sec. 907 (a) 47
Sec. 907 (b) 48
Sec. 907 (e) 49
Sec. 910 10
Sec. 911 ..... 5, 30
Sec. 913 49
Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 405 ..... 27, 45

Miscellaneous:

Agricultural Adjustment, 1933-1935, U. S. Dept. Agriculture, p. 141 15
An Analysis of the Effects of the Processing Taxes, prepared by the Bureau of Agricultural Economics and published by the Bureau of Internal Revenue, 1937 8
H. Rep. No. 6, 73d Cong., 1st Sess 22
H. Rep. No. 2475, 74th Cong., 2d Sess 11, 12, 13, 15, 17, 19, 20, 32, 36
H. Rep. No. 2818, 74th Cong., 2d Sess 7, 9, 10, 12, 13, 30
H. R. 12395, 74th Cong., 2d Sess 18, 34
H. R. 12793, 74th Cong., 2d Sess 18, 34
Hearings on Revenue Act of 1936, Ways and Means Committee, House of Representatives, 74th Cong., 2d Sess 19
Hearings on the Revenue Act of 1936 (H. R. 12395), Senate Committee on Finance, 74th Cong., 2d Sess 7, 12, 20
26 Op. A. G. 355, 359 22
Regulations 83, Art. 3 (a) (1) (D) 20
Regulations 96:
Art. 302 ..... 28, 31, 54
Art. 402 ..... 31, 54
Art. 502 ..... 31, 54
Art. 602 ..... 28, 31, 55
S. Rep. No. 2156, 74th Cong., 2d Sess 7, 9, 10, 11, 12, 13, 15, 18, 19, 20, 30, 32, 34
T. D. 4671, XV-2 Cum. Bull. 424:
Art. 1 (a) 50
Art. 1 (b) 20, 50
Art. 1 (c) 50
Art. 1 (d) 50
Art. 1 (e) (1) 51
Art. 1 (e) (2) 20, 51
Art. 1 (f) 52
Art. 1 (g) 52
Art. 6 ..... 20, 52

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 23

WILSON AND CO., INC., PETITIONER

v.

THE UNITED STATES

No. 24

WILSON & CO., INC., OF KANSAS, PETITIONER

v.

THE UNITED STATES

No. 25

T. M. SINCLAIR & COMPANY, LIMITED, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 11–15) is reported in 30 F. Supp. 672.

JURISDICTION

The judgment of the court below was entered December 4, 1939 (R. 15). On January 10, 1940, a motion for leave to file amended petitions was filed which was overruled on February 5, 1940 (R. 15). The petition for writs of certiorari was filed March 1, 1940 (R. 18), and granted April 22, 1940. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether a processor who exported products on which it paid processing and floor stock taxes under the Agricultural Adjustment Act may sue for the recovery of export refunds in the Court of Claims.

STATUTES INVOLVED

The pertinent portions of the applicable statutes and regulations are set forth in the Appendix, *infra,* pp. 38–55.

STATEMENT

The court below decided these cases upon the petitions and motions to dismiss (R. 11). From the petition in No. 23,[1] the following facts appear (R. 1–3):

The petitioner prepares, packs, and sells hog products for foreign and domestic commerce (R. 1).

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[1] The facts in all three cases are almost identical, and we have confined our statement to those presented in No. 23.

Between November 5, 1933, and January 6, 1936, the petitioner exported, in its own name, large quantities of hog products to foreign countries, with respect to which it had paid processing taxes and floor stock taxes under Sections 9 (c) and 16 (a) of the Agricultural Adjustment Act (R. 1).

After exportation of the hog products, and prior to June 22, 1936, the effective date of the Revenue Act of 1936, the petitioner filed claims under Section 17 (a) of the Agricultural Adjustment Act for refund of processing and floor-stock taxes paid in the amount of $144,666.03. Each of these claims was rejected by the Commissioner of Internal Revenue (R. 2, 3) and suit was brought in the Court of Claims.

The Government moved to dismiss the petitions on the ground that the court was without jurisdiction because of the limitations of Title VII of the Revenue Act of 1936 (R. 10). The Court of Claims held that it was without jurisdiction, because Section 601 (e) of Title IV made the Commissioner's determination final, and dismissed the petition (R. 15).

SUMMARY OF ARGUMENT

I

Petitioners urge that their claims for export refunds arise under Section 17 (a) of the Agricultural Adjustment Act; the court below held that they are governed by Section 601 of Title IV of the Revenue Act of 1936; and we urge that these claims

can be presented only under Title VII of that Act, as a part of petitioners' claims for all taxes illegally collected.

A. Congress met the gigantic and complex tax refund problem created by *United States* v. *Butler*, 297 U. S. 1, by placing refunds to taxpayers under Title VII and refunds to exporters, to those who delivered to charities, and to those who held floor stocks on January 6, 1936, under Title IV. The processor-exporter, who without special provision might have fallen in either group, was placed in Title VII because: (1) it was desirable in Title VII to obtain as complete a picture as possible of his processing operations; (2) inclusion of processors who were liable for but who had not paid the taxes due in Title IV might have operated to give them refunds of unpaid taxes; and (3) there might otherwise have been doubts as to the propriety or validity of providing an exclusive administrative remedy for the refund of amounts collected as taxes.

B. Section 601 (a) reenacts Section 17 (a), but this reenactment is qualified by the provision of Section 601 (b) that no export refund shall be made to the processor who paid or was liable for the tax. This plain meaning of Section 601 (b) is confirmed by the committee reports and the regulations.

It is immaterial that, prior to the *Butler* decision, Section 17 was designed to aid exporters by

providing complete relief from the tax; Congress made its numerous amendments precisely because the Agricultural Adjustment Act provisions contemplated an operating tax program, not the intricate and carefully integrated tax-refund system found necessary in 1936. Neither fair dealing by Congress nor any constitutional doubt warrants petitioners' attempt to rewrite the statute.

C. Petitioners' only remedy is under Title VII, where provision is made for all the refund claims of processors; the court below concededly has no jurisdiction if this construction is correct. Title VII is less attractive to the petitioners, because they must show that they bore the burden of the tax, but there can be no question of its adequacy. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. Section 906 (a) in terms makes its procedures the exclusive remedy for amounts paid as processing taxes. Section 911, excepting from Title VII the export refunds authorized by Section 17 (a) "as amended and reenacted," does not save petitioners, for refund to them under Section 17 (a) is forbidden by Section 601 (b). The committee report makes this clear beyond dispute, and the regulations follow this interpretation.

II

The court below therefore erred in holding that petitioners' claims are covered by Section 601. But, if petitioners could somehow overleap the barrier of Section 601 (b), the court below was

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plainly right in holding that Section 601 (e), making the Commissioner's determination final, ousted it of jurisdiction to review his denial.

ARGUMENT

I

THE COURT OF CLAIMS IS WITHOUT JURISDICTION BECAUSE PETITIONERS' EXCLUSIVE REMEDY IS UNDER TITLE VII

The petitioners paid processing taxes and floor stocks taxes with respect to hog products which were exported by them prior to the invalidation of the Agricultural Adjustment Act in *United States* v. *Butler,* 297 U. S. 1.

Under Section 17 (a) of the Agricultural Adjustment Act, *infra,* the Commissioner was to refund to the exporter an amount equivalent to the tax. Section 601 of Title IV of the Revenue Act of 1936, *infra,* in subdivision (a) reenacted Section 17 (a), but in subdivision (b) provided that no refund under Section 601 should be made to the processor or other person who paid or was liable for the tax. Sections 902–911 of Title VII of the Revenue Act of 1936, *infra,* enacted a refund procedure for the recovery by the taxpayer of processing and floor stocks taxes paid.

There are, then, three different provisions under which it might be argued that the petitioners may claim reimbursement for the processing and floor-stocks taxes paid with respect to the

exported articles: (1) Petitioners urge that they come under Section 17 (a) of the Agricultural Adjustment Act [2] (Br. 14–29). (2) The court below held that they are included in Title IV of the 1936 Act (R. 12–14). (3) The Government argues that petitioners are within Title VII of the 1936 Act. The question in this case is simply which of the three procedures is applicable. The issue is narrow, but the difficulties which the lower courts have had suggest the desirability that the precise question be considered against the background of the general problem which Congress faced in 1936.

A. THE LEGISLATIVE PROBLEM IN 1936

The first processing tax under the Agricultural Adjustment Act became effective on July 9, 1933. In the succeeding 30 months over $960,000,000 was collected under that Act; another $237,000,000 was estimated to have been due but unpaid on January 6, 1936, when *United States* v. *Butler,* 297 U. S. 1, was decided.[3]

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[2] *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) 937 (C. C. A. 7th), certiorari denied, 303 U. S. 659, and *Neuss, Hesslein & Co., Inc.* v. *United States*, 30 F. Supp. 595 (S. D. N. Y.), so held, at least as Section 17 (a) was reenacted by Section 601.

[3] H. Rep. No. 2818, 74th Cong., 2d Sess., p. 2; S. Rep. No. 2156, 74th Cong., 2d Sess., p. 32; cf. testimony of Secretary Wallace, Hearings on Revenue Act of 1936 (H. R. 12395) before Senate Committee on Finance, 74th Cong., 2d Sess., p. 843.

Congress was faced with problems of unprecedented complexity in dealing with the refund procedures for this gigantic tax collection. The Agricultural Adjustment Act imposed a variety of taxes: processing taxes under Section 9, floor stocks taxes under Section 16, compensating taxes on imported products under Section 15 (e), compensating taxes on competing products under Section 15 (d), and taxes with respect to certain contracts, made before the effective date of the tax, under Section 18. It also provided for a number of tax refunds; those taxes which were paid with respect to articles exported to foreign markets, under Section 17 (a); those taxes paid with respect to articles delivered to charitable institutions, under Section 15 (c); those taxes found by the Secretary of Agriculture to be unduly burdensome, under Section 15 (a); and a floor stocks refund, under Section 16 (e), when the processing tax was decreased.

In general, the burden of the taxes had been shifted on to the consumer or back to the producer through correspondingly increased sales prices or decreased purchase prices,[4] but this could not be said to have been the invariable result. During the last ten months of the life of the tax, collections

[4] See Brief for Respondent in *Anniston Mfg. Co.* v. *Davis*, No. 667, October Term, 1936, pp. 83–91; *An Analysis of the Effects of the Processing Taxes*, prepared by Bureau of Agricultural Economics and published by the Bureau of Internal Revenue, 1937.

were with increasing frequency enjoined by court order. This added special complications with reference to claimants for export or charitable refunds who had purchased from the processor and who could typically be assumed to have borne the burden of the tax through higher prices even though the processor had not paid the tax to the Government.[5]

In the Revenue Act of 1936 Congress attempted to do substantial justice to each of these classes, and yet to withhold the refunds when their payment would amount to unjust enrichment. See *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351. And, in accomplishing these ends, it was forced to bear in mind the tremendous administrative task inherent in the refund problem.[6] A rather intricate pattern for making the tax refunds resulted.

The refund of taxes illegally collected was governed by Title VII. No refund was permitted except so far as the claimant could show that he bore the burden of the tax. Section 902. Floor stocks

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[5] The customary procedure was for the amount of the tax due to be paid into court during the life of the injunction; after *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, the impounded funds were recovered by the taxpayers.

[6] The Congressional Committees estimated that more than 1,000,000 claims for refund of taxes would be presented, distributed as follows: $850,000,000 in processing taxes, paid by 73,000 taxpayers; $98,000,000 in floor stocks taxes, paid by 1,000,000 taxpayers; and $12,000,000 in compensating taxes, paid by 75,000 taxpayers. H. Rep. No. 2818, p. 2, and S. Rep. No. 2156, p. 32.

and compensating taxes were expected to produce a large number of claims in relatively small amount, and were expected to present rather simple issues in the inquiry whether the taxpayer bore or shifted the burden of the tax.[7] The ordinary provisions for suit in the district courts and in the Court of Claims were therefore retained. Section 905.[8] Processing tax refunds, on the other hand, were expected to present extremely complicated economic and accounting considerations; there was created, therefore, a Processing Tax Board of Review, in the Treasury Department, to have initial jurisdiction of petitions filed by claimants dissatisfied with the Commissioner's action.[9] Review of the Board's action would be had in the Courts of Appeals. Sections 906 and 907.

The scheme for refunds to others than taxpayers took a different form. These refunds were to be made to persons who exported or delivered to charities, as was done under the Agricultural Adjustment Act,[10] and also to persons who held floor stocks

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[7] H. Rep. No. 2818, p. 2; S. Rep. No. 2156, p. 33.

[8] In Section 910 it was provided that no Collector should be liable for collecting a tax under the Agricultural Adjustment Act. The $10,000 limitation on suits in the district courts against the United States was therefore removed in Section 905.

[9] H. Rep. No. 2818, p. 2; S. Rep. No. 2156, p. 33.

[10] Sections 15 (c) and 17 (a) of the Agricultural Adjustment Act. Sections 15 (a) and 16 (e) of that Act, which provided for refunds when the processing tax was reduced or suspended, were also preserved.

on January 6, 1936.[11] Since the claimants were not taxpayers, they would be asking for Congressional bounty rather than for the recovery of illegally collected taxes; the determination by the Commissioner of the amounts due them was therefore made final.[12] Sections 601 and 602.

The processor, who paid the tax, and who also exported the articles or delivered them for charitable use, presented a special difficulty, since his claim could be viewed as either a claim for an export or charitable refund or as a claim for a refund of taxes paid. But several considerations pointed to the desirability that these claims be presented under Title VII rather than under Title IV. In the first place, if an adequate examination of the incidence of the processing tax was to be made under Section 907, it was considered preferable so far as possible to look at the whole of the processor's operations, rather than to create added difficulties by attempting to segregate that processing which happened to result in articles which were exported

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[11] The floor stocks refund was designed to leave the persons who purchased before January 6, 1936, in an equal competitive situation with those who purchased tax-free thereafter. H. Rep. No. 2475, 74th Cong., 2d Sess., p. 15, S. Rep. No. 2156, p. 29.

[12] H. Rep. No. 2475, 74th Cong., 2d Sess., p. 14; S. Rep. No. 2156, p. 27. See *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 146–147; *United States* v. *Allen*, 163 U. S. 499, 504; cf. *Campbell* v. *United States*, 107 U. S. 407, 413.

or delivered for charitable use.[13] In the second place, it was believed that a large number of exporters or persons who delivered for charitable use had borne the burden of the tax even though the processor, with the aid of court injunction, had not paid the tax. In the interests of justice, it was desirable to permit them to obtain refunds without proof that the tax was paid,[14] and Section 601 (b) removed that limitation. But plainly the processor, who may well have avoided payment of the tax, should not be included in these refund procedures which were designed for his customers.[15]

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[13] The Committees were anxious that "the complex tax picture" of the processor be presented in a single claim. H. Rep. No. 2818, p. 4; S. Rep. No. 2156, p. 35. When it was urged that the refund claims under Section 15 (a) of cotton processors who manufactured large cotton bags should be allowed under Title IV, the witness stated that the Bureau's administrative difficulties with other types of processor's claims did not exist under Section 15 (a). Hearings on Revenue Act of 1936 (H. R. 12395), Senate Committee on Finance, 74th Cong., 2d Sess., p. 446.

[14] See Senate Hearings, pp. 549–552, 833–834, 870, 943.

[15] The provision that refund should be made to the exporter or upon charitable delivery without proof of payment of the tax was included by the Senate Committee, which accordingly noted that the benefits of that provision would not extend to the only processors (of large cotton bags) able to claim under Section 601. S. Rep. No. 2156, p. 28. A similar provision with respect to floor stocks refunds had appeared in Section 602 of the bill as introduced in the House, from the benefits of which the processor was also excluded. H. Rep. No. 2475, pp. 15–16.

In the third place, it was not entirely clear that the exporter who was also a processor would be presenting a claim for a gratuitous benefit, instead of seeking recovery of taxes illegally collected. This would make Congress hesitant to include the processor in a procedure which made the Commissioner's determination final and prevented judicial review.[16]

We submit, therefore, that Congress considered the most feasible solution of the problem of the processor-exporter to require that he be treated as a processor rather than an exporter, and that the Revenue Act of 1936 produces the intended result. The succeeding sections will demonstrate this in detail.

B. PETITIONERS CANNOT OBTAIN A REFUND UNDER SECTION 17 (a) OR SECTION 601

1. Section 17 (a) of the Agricultural Adjustment Act, *infra*, provides:

> Upon the exportation to any foreign country * * * of any product * * * with respect to which * * * a tax has been paid or is payable under this title, the tax * * * shall be credited or refunded. * * * the credit or refund shall be allowed to the consignor named in the bill of lading * * *.

[16] H. Rep. No. 2475, p. 14; see H. Rep. No. 2818, p. 5; S. Rep. No. 2156, p. 36.

Section 17 (a) probably fell with the decision in *United States* v. *Butler*, 297 U. S. 1.[17] But whatever might have been the ultimate outcome of an inquiry into its continued vitality, Congress did not care to allow Section 17 (a) to remain without further action. Instead, it reenacted Section 17 (a), together with other refund provisions, in Section 601 (a) of the Revenue Act of 1936,[18] and in the succeeding subdivisions of Section 601 prescribed various conditions upon the refunds to be made under the reenacted provisions.

Section 601 (a) of the Revenue Act of 1936, *infra*, provides:

> The provisions of sections * * * 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where * * * the exportation * * * took place prior to January 6, 1936.

If Section 601 (a) stood alone, it could be argued that petitioners could file their claim for an export

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[17] That case held invalid the tax provisions of the Agricultural Adjustment Act and the benefit payments authorized by that Act. The tax-refund provisions of a statute are certainly inseparably linked with the tax provisions, in the sense that Congress would not have enacted the refund provisions without the tax. And Congress demonstrably would not have desired to retain the export-refund provisions after invalidation of the tax (cf. *Kay* v. *United States*, 303 U. S. 1, 7), for in Section 601 it enacted various limitations designed to meet that new situation.

[18] This was in order "to remove doubts as to the legal authority of the Commissioner * * * to continue the

refund under, according to one's taste in denomination, either Section 17 (a) or Section 601.[19] But subdivision (a) does not stand alone. It is followed immediately by Section 601 (b), *infra*, which provides:

> Except for refunds under Section 15 (a) of the Agricultural Adjustment Act,[20] as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. * * *

It is not easy to see how Congress could more clearly have excluded the processor from obtaining an export refund than by the provision that "no refund under this section shall be made to the processor or other person who paid or was liable for the tax". Yet petitioners urge, and two courts

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making of refunds" and to prescribe the conditions found in the subsequent subdivisions of Section 601. H. Rep. No. 2475, pp. 13–14; S. Rep. No. 2156, pp. 28–29. See Pet. Br. 16–17.

[19] The conclusion even on this hypothesis would by no means be certainly correct. If petitioners be viewed as processors rather than exporters, Title VII, provides an exclusive remedy. See *infra*, pp. 26–31.

[20] Section 15 (a) provided for refund of processing taxes after certification by the Secretary of Agriculture that a designated class of articles was of such low value, considering the quantity of the commodity used in its manufacture, that the processing tax would prevent its use in whole or large part. This provision was applied only with respect to large cotton bags. See Agricultural Adjustment, 1933–1935, U. S. Dept. Agriculture, p. 141.

have ruled, that a processor *can* obtain an export refund. *Cudahy Bros. Co.* v. *La Budde,* 92 F. (2d) 937 (C. C. A. 7th), certiorari denied, 303 U. S. 659. *Neuss, Hesslein & Co., Inc.* v. *United States,* 30 F. Supp. 595. None of the suggested grounds of escape from the language of Section 601 (b) has the slightest substance:

(a) The court below held, and petitioners urge (Br. 20), that Section 601 (b), in providing that "no refund under this section shall be made to the processor", means that no refund should be made to the processor who was not an exporter as well (R. 13). But Section 601 (b) covers *all* processors, and the decision below rewrites the statute. That construction, moreover, makes the provision into an idle redundance of Congress, for a processor who did not export could not possibly have obtained an export refund under Section 17 (a).

(b) The court in the *Cudahy* case held that Section 601 (b) could not mean what it said because this would contradict Section 601 (a), allowing export refunds (92 F. (2d) at 938–939). Petitioners agree (Br. 19). But Section 601 (a) relates to exporters generally, and Section 601 (b) to the exporter who has not purchased the exported article after processing but has instead processed the commodity and himself paid the tax. There is no more contradiction in these pro-

visions than in any particular exception to the general rule.

(c) Petitioners also suggest (Br. 19–20) a rather complicated operation on Section 601 (b) by which it would exclude only the refund claim of the processor-exporter who forsook his claims for an export refund and instead claimed under Title IV solely on the ground that the tax was illegally collected.[21] But Section 601 (b) excludes a refund to *all* processors, not merely to those hardy processors who choose to urge only their weaker grounds for claiming a refund under Title IV.

2. We do not see room for doubt as to the meaning of Section 601 (b). But it is significant that the Committee Reports show with equal clarity that Congress meant just what it said, and intended to permit the export refunds to be claimed only by those exporters who were not subject to the tax.

The House Committee said (H. Rep. No. 2475, 74th Cong., 2d Sess., p. 14):

> Section 601 (b) excludes from the benefits of the section the processor or other person who paid the tax with respect to the articles on which the claim is based, for the reason

[21] Petitioners, we think, ascribe an undue subtlety of approach to the *Cudahy* opinion when they state that the court reached a similar conclusion there (Br. 19). In truth, the *Cudahy* opinion seems to us to advance the startling proposition that Section 601 (b) was designed to forbid refunds even to processors who claimed under Title VII. 92 F. (2d) at 938–939.

> that the claims of such persons are within the provisions of section 21 (d) of the Agricultural Adjustment Act, as amended.[22]

The Senate Committee, while explaining the desirability for permitting the claims of processors of large cotton bags to be presented under Section 601, was as explicit as the House Committee that other processors could obtain refunds only under Title VII, and could not claim under Title IV. It said (S. Rep. No. 2156, 74th Cong., 2d Sess., p. 28):

> Your committee is of the opinion that the House bill should be amended by striking out section 601 (b) and substituting a new subsection. This provision of the House bill would deny the benefits of the section to any processor or other person who paid the processing tax with respect to the articles on which a claim is based. The amendment recommended by your committee would make an exception to this limitation in the case of refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, to remove an inadvertent discrimination against a limited number of manufacturers of large cotton bags who are also processors of cotton yarn and to

[22] The provisions which became Title VII of the 1936 Act were not in the bill as it passed the House (H. R. 12395) but were then contained in a separate bill (H. R. 12793). In consequence, Section 21 (d) of the Agricultural Adjustment Act, which was later replaced by Title VII, at the time of this report contained the existing provisions for refund of processing taxes to those who had borne their burden.

> correct what would otherwise be an unfortunate competitive situation.
>
> The claims for refund of other processors are adequately provided for by title VII which your committee recommends be added as an amendment to the House bill. * * *

Section 602 provides for floor-stocks refunds for articles, with respect to which a processing tax was due or paid, which were on hand on January 6, 1936. This refund, designed to make whole a person to whom the burden of the tax had been shifted through higher prices and who would have to sell in a tax-free market, similarly excluded the processor from its benefits. Section 602 (a). The Committee Reports explain that here, as with the refunds directed by Section 601, the processing-tax refund provisions of Title VII were an adequate remedy for the processor. H. Rep. No. 2475, p. 15; S. Rep. No. 2156, p. 29.

The hearings show a consistent understanding that the processor-exporter would be unable to obtain an export refund. In the Senate hearings,[23] five witnesses protested the exclusion of the processor-exporter from Title IV by Section 601 (b);[24]

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[23] The House hearings (Hearings on Revenue Act of 1936, Ways and Means Committee, House of Representatives, 74th Cong., 2d Sess.) were held before the bill was introduced or its text known.

[24] J. W. Oliver, American Management Association (p. 215); Edward F. Howrey, Textile Bag Industry (pp. 444–446); John C. White, Standard Rice Co., pp. 796, 797); Herman Fakler, Millers' National Federation (p. 951); J. E.

no witness or committee member suggested that the processor-exporter would in fact be able to obtain an export refund.[25]

The Treasury Regulations, too, forbid the processor to file a claim for export refunds. T. D. 4671, XV–2 Cum. Bull. 424, Art. 1 (b), 1 (e) (2), *infra*; cf. Regulations 83, Art. 3 (a) (1) (D), as amended by Art. 6 of T. D. 4671, *supra*. The general rule as to the weight to be attached to a contemporaneous administrative construction is fully applicable in the field of export refunds. *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 146; *National Lead Co.* v. *United States,* 252 U. S. 140, 145–146.

3. Explicit attention should perhaps be directed to a possible consequence of disregarding the prohibition of Section 601 (b) against granting export refunds to processors. On January 6, 1936, there were about $237,000,000 of processing taxes due but unpaid (*supra,* p. 7). Congress felt that it would be unjust to deny export refunds, even though no tax had been paid with respect to the article, presumably because the processor in most cases had nonetheless included its amount in the price charged the exporter. Section 601 (b); S. Rep. No. 2156, p. 28; cf. H. Rep. No. 2475, p. 16.

Edgerton, Southern States Industrial Council, Inc. (p. 955). Hearings on the Revenue Act of 1936 (H. R. 12395), Senate Committee on Finance, 74th Cong., 2d Sess.

[25] This general understanding would seem to make reference to the hearings a permissible aid to construction. Cf. *United States* v. *San Francisco,* 310 U. S. 16.

Under the decision of the court below, a processor may file a claim under Section 601. If this be correct, there might be a possibility that a processor who had not paid the tax could nevertheless file a claim for and obtain a refund equivalent to the amount of tax which he did not pay. The result would be shocking, and doubtless was not contemplated by the court below. This circumstance gives redoubled force to the rule that provisions for export refunds must be strictly construed against the claimant. *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 146; *United States* v. *Allen,* 163 U. S. 499, 504.

4. Petitioners urge that this construction cannot be adopted because it would imply "a complete *volte face* by Congress" from its policy enacted during the preceding summer (Br. 14–15, 17–18, 21), and on this ground seek to explain away the clarity of the committee reports, one of which referred to the processor's former remedy under Section 21 (d) (Br. 21). Apart from the more basic consideration that Congress enacted Titles IV and VII of the Revenue Act of 1936 in the light of the supervening decision in *United States* v. *Butler,* 297 U. S. 1, petitioners' argument is pitched on the faulty premise that they could claim under Title IV if Section 21 (d) had not been replaced by Title VII. But Section 21 (d) was made inapplicable to "any refund * * * authorized by * * * section 17", and, as limited by Section 601 (b), Section 17

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does not authorize a refund to the processor-exporter.

5. Running throughout petitioners' argument is an appeal for a construction which would recognize the moral obligation of Congress to continue the export refunds on the faith of which they exported (Br. 2–11, 16, 17). The argument is irrelevant, since the Court's function is to construe legislation and not to assay its morality. Moreover, it proceeds upon a wholly mistaken premise.

We do not dispute that Congress, in enacting the Agricultural Adjustment Act, intended by Section 17 (a) to protect the American exporters, who would be seriously handicapped if they had to sell in a tax-free market products which included the amount of the processing tax in their price.[26] But that purpose has no relevance to the present issue.

During the normal operation of the processing tax provisions, the tax was collected from the processor and refunded to the exporter under Section 17 (a); alternatively, under Section 17 (b), *infra*, commodities could be processed in bond for ex-

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[26] The only Congressional Committee Report which mentions the purpose of Section 17 (a) states: "provision is made for refund of processing taxes with respect to exports, thereby continuing the present competitive situation of our products in foreign markets." H. Rep. No. 6, 73d Cong., 1st Sess., p. 6. Compare *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, 216, 219; *Swan & Finch Co.* v. *United States*, *supra*, 146; 26 Op. A. G. 355, 359.

portation without the payment of the tax. So long as the normal tax collection machinery continued to operate, the exporter of course could expect relief from the processing tax through either subdivision of Section 17.

But that tax machinery had no application to the situation after the decision in *United States* v. *Butler,* 297 U. S. 1. Competing considerations had then come to the foreground. In place of an operating system of tax collection and export refunds, Congress was faced with the quite different problem of accomplishing both fair treatment for the taxpayer and protection for the Treasury after the tax machinery had been brought to a halt. The complicated tax refund problems which then arose required, as we have explained, that the processor-exporter be treated as a processor rather than as an exporter for the purpose of obtaining the refund. Otherwise a less complete picture of his operations would be obtained for the purposes of Section 907, there might be danger of refunds of taxes to processors who had not paid them, and it might have been objected that a purely administrative remedy was improper for amounts collected as taxes. (See *supra,* pp. 11–13.) The petitioners' argument seems to be that Congress was so determined to encourage foreign trade that, at a time when that trade would no longer be affected, it would dislocate its refund procedures simply to preserve the older mechanism of the export refunds

to processors. It is at best an improbable motive to ascribe to Congress, and is flatly contradicted by the language of the Act and the Committee Reports.[27]

There is nothing in this to violate the most sensitive standards of legislative fair dealing. If, as was probable, petitioners bore the burden of the processing tax with respect to their exported products (see Pet. Br. 3–8), this fact will permit recovery of the amount of the tax in their claims filed under Title VII. It is true that petitioners will be put to the inconvenience of including these amounts in their Title VII calculations, and that the accounting complications might be such as to preclude an absolute accuracy in that determination. But those inconveniences hardly amount to a breach of moral obligation and simply raise issues already decided by this Court. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

6. Finally, petitioners invoke a constitutional doubt by which to justify their construction of Sec-

[27] *Thompson* v. *United States,* 142 U. S. 471, shows that the tax machinery is not to be dislocated simply because of a desire to encourage exportation. There an exporter of distilled spirits, who manufactured in bond for exportation, was held liable to internal revenue taxation on 1,065 gallons which evaporated after withdrawal from the warehouse and before exportation.

[28] No constitutional question was raised below or in the petition for a writ of certiorari. We assume, however, that a "constitutional doubt" may properly be considered as within the scope of the questions of statutory construction which are presented.

tion 601 (Br. 16, 24–29).[28] The argument is intricate and ingenious: Section 17 (a) is described as an offer, the exportation as an acceptance; the result is said to be a contract, and the refund claim beyond the power of Congress to destroy. The remedies offered by Title VII are put aside, since they relate to petitioners' claim for taxes paid and not to their claim (based upon the same payments) for export refunds. The argument has two fatal defects.

In the first place, the claim for an export refund is not a contract right. In *Campbell* v. *United States,* 107 U. S. 407, it is true, the Court held the Court of Claims had jurisdiction to entertain a suit to recover a drawback which the Secretary of the Treasury had refused to pay, in violation of the statute and his own regulations. It sustained jurisdiction on two grounds: (1) the suit was founded on a law of the United States, and (2) it arose on an implied contract (107 U. S. at 410–411).[29] The *Campbell* case was followed in *Durant* v. *United States,* 28 C. Cls. 356, 368 (1893), upon which petitioners also rely. But subsequent cases have made plain that the export refund is not a contract right but a gratuity. In *United States* v. *Allen,* 163 U. S. 499, the importer was refused a drawback when he re-ex-

[29] We have found no subesquent case which considers the jurisdictional problem. On principle, jurisdiction would seem to rest upon the ground that a suit for an export refund is based upon a law of the United States.

ported coal after repeal of a drawback statute.[30] The Court described (pp. 503–504) the drawback as "an exceptional privilege or exemption from the general operation of a law." In *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 146, the Court resolved doubts against the claimant because the drawback was "a governmental grant of a privilege or benefit."

Petitioners' contention, in short, is that any taxpayer who has relied upon a tax exemption or deduction has a contractual right, protected by the Constitution, to its continuance. It is contradicted by the uniform and unquestionably valid practice of making income-tax statutes retroactive for varying periods of time, even though they reduce or deny deductions formerly available. See *Welch* v. *Henry,* 305 U. S. 134; *United States* v. *Hudson,* 299 U. S. 498, 500–501.

In the second place, if there were a contract right, it is not destroyed by the Revenue Act of 1936. Petitioners paid processing and floor stocks taxes on the exported products; they have, as they urge, two grounds for claiming a refund of each payment—the export refund and the recovery of taxes illegally collected. Either ground may be destroyed without ground for complaint by petitioners so long as the other remains. Their objection to the elimination of the export refund, then,

[30] Neither the opinion nor the record indicates whether the coal was imported during the life of the drawback statute.

is simply that Title VII, their remaining remedy, unconstitutionally requires them to show that they bore the burden of the tax. This contention has already been rejected by this Court. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

C. PETITIONERS' ONLY REMEDY IS UNDER TITLE VII

Petitioners, then, cannot obtain an export refund under Section 17 (a) or under Section 601. But they are not remediless, for Title VII contains an elaborate procedure for refund of the taxes paid, whether as floor stocks or as processing taxes, with respect to the exported articles.[31] But, as petitioners recognize, the court below has no jurisdiction if their remedy is under Title VII.[32]

The remedy under Title VII may be less attractive to petitioners, in that they will have to show that they bore the burden of these taxes, in common with all other processing or floor stocks

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[31] Section 903, as amended by the Revenue Act of 1939, c. 247, Sec. 405, 53 Stat. 862, provides that Title VII claims must be filed prior to January 1, 1940. Petitioners would now be barred by limitation if their Title VII claims did not include the amounts paid with respect to the exported articles for which refunds are sought in this suit.

[32] No claim was filed after enactment of the Revenue Act of 1936. Sec. 903. The Commissioner has not denied that claim. Sec. 904. There is no showing that petitioners bore the burden of the taxes. Sec. 902. And, so far as the processing tax is concerned, the Commissioner's action has not been reviewed by the Processing Tax Board of Review; the prescribed procedure for review of the Board's action has not been followed; and the Court of Claims has no jurisdiction of those proceedings. Section 906.

taxes imposed on them.[33] But there can now be no question of its general adequacy. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

The statutory mechanism is clear. Claims are to be filed under Section 903. The Commissioner, under Section 902, is authorized to allow the claim to the extent that the claimant bore the burden of the tax. In the case of floor stocks taxes, suit may be brought in the district courts or in the Court of Claims after denial by the Commissioner. Section 905. In the case of processing taxes, review of the Commissioner's action is before the Processing Tax Board of Review, with subsequent review in the federal Courts of Appeals and in this Court. Section 906. Section 907 creates an intricate series of presumptions by which to aid in determining whether the claimant bore the burden of the tax.

These provisions are plainly applicable and appropriate whether the taxpayer sold the articles in this country or exported them. Petitioners' assertion of their "fundamental inapplicability" rests only on their mistaken premise that their export refunds should in justice be allowed without proof of their bearing the burden (Br. 22–23).

Moreover, Section 906 (a) in terms makes its procedures the exclusive remedy for the refund of

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[33] Section 903 authorizes the Commissioner by regulation to prescribe the number of claims which may be filed by any person. By Articles 302 and 602 of Regulations 96, claimants are to file a single claim for all floor stocks taxes and a single claim for each commodity upon which processing taxes were paid.

amounts paid as processing taxes. The language is emphatic and unmistakable:

> Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. * * *

Petitioners, however, urge that their claims for export refunds of processing and floor-stocks taxes are not governed by Title VII. They rely only upon Section 911, which provides:

> The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930.[34] * * *

This provision cannot serve to remove petitioners' claims from the provisions of Title VII and to place them under Section 17 (a), because it excludes only those refunds authorized under that section "as amended and reenacted." It was reenacted by Section 601, which, we have shown,

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[34] Section 317 of the Tariff Act of 1930 is irrelevant here. It merely provides that tobacco delivered for consumption outside the country shall be deemed exportation within the meaning of the laws relating to the exportation without payment of duty or taxes.

excludes export refunds to processors. As reenacted, then, Section 17 does not authorize a refund to petitioners, and they therefore are not excluded by Section 911 from claiming under the provisions of Title VII.[35] Petitioner escapes this conclusion only by blurring the statutory language and stating that Section 911 "categorically" excludes claims for "export drawbacks" (Br. 18, 22).

The plain meaning of Section 911 is entirely confirmed by the Senate Committee Report.[36] It said (S. Rep. No. 2156, pp. 36–37):

> Section 911 also provides that the provisions of this title do not apply to export, charitable, and certain other refund claims, the adjustment of which is authorized by sections 15, 16, and 17 of the Agricultural Adjustment Act and section 601 of H. R. 12395. It is necessary to provide specifically that this title does not apply to such claims so that there will be no confusion between

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[35] The occasion for the quoted portion of Section 911 is found in the fact that the various conditions and procedures of Title VII might otherwise be held applicable to the refunds to others than taxpayers authorized by Sections 601 and 602. Section 902, for example, requires that the claimant show that he did not shift the burden of the tax and Sections 905 and 906 provide special procedures for refunds under Title VII. Section 911 ensures that these should not be applied to the export refunds authorized under Title IV.

[36] H. Rep. No. 2818, p. 6, contains only the first two sentences quoted from the Senate Report. The additional matter doubtless represents an answer to the protests made to the Senate committee because of the exclusion of the processor-exporter from the benefits of Title IV. See *supra*, p. 19.

> the provisions of this title and section 601 of H. R. 12395. It is not the intent of this section, however, to limit the rights of processors who have paid processing taxes on articles or commodities which they have themselves subsequently exported or delivered for charitable distribution or use to obtain refunds of such processing taxes subject to the requirements of this title, since such processors are, with one minor exception, not entitled to the benefits of section 601 of title IV.

Finally, Regulations 96 explicitly require that a single claim be filed under Title VII for *all* floor stocks taxes, or *all* processing taxes with respect to a given commodity. Articles 302, 602; see also also Articles 402 and 502; all *infra*.

We submit, therefore, that Section 601 (b) plainly excludes export refunds to those who paid the tax and that Title VII plainly includes those claims for refund in its scope. This conclusion is confirmed both by the committee reports and by the regulations with respect to both Title IV and Title VII.

II

EVEN IF PETITIONERS CAN CLAIM UNDER TITLE IV, THE COURT OF CLAIMS IS YET WITHOUT JURISDICTION

Petitioners do not urge that they can claim under Section 17 (a) of the Agricultural Adjustment Act without reference to Section 601 of Title IV. And, as the court below discovered, even if petitioners are able somehow to hurdle the barrier found in Section 601 (b) to recovery of an export refund by

a processor, they are impaled upon another limitation, found in Section 601.

Section 601 (e) provides, with unmistakable clarity, that—

> The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

Since the Commissioner has denied petitioners' claims for refund, it is entirely plain that the court below had no jurisdiction to reexamine that denial or to entertain petitioners' suits.

The House Committee report reflects this evident purpose of Congress.[37] It states (H. Rep. No. 2475, p. 14):

> Section 601 (e) makes the determination of the Commissioner of Internal Revenue with respect to any refund under this section final and not subject to judicial review, and section 601 (f) disallows any claim for interest with respect to claims for refund made under this section. It is the opinion of your committee that, while provision for the relief of claimants in the cases covered by this section should be made, the fact that the refunds will be made to persons other than those who paid or were liable for payment of the tax under the Agricultural Adjustment Act, as amended, and the present

[37] The Senate report does not discuss Section 601 (e), to which it proposed no amendment. See S. Rep. No. 2156, p. 28.

> doubt as to the legal status of these claims warrants the disallowance of interest and the withdrawal of any right to judicial review of the determinations of the Commissioner.

Petitioners, however, offer a variety of contentions by which to escape the unequivocal command of Section 601 (e). None has substance.

1. "The determination of the Commissioner", they say (Br. 31–34), means only his determination of conversion factors, facts and computations, and does not mean his determination of legal questions. This construction rewrites the statute. It also ignores the clause that "no court shall have jurisdiction to review such determination", which would be an inept provision if the court were to have jurisdiction and was simply directed to accept as final an undefined part of the rulings involved in the case. Finally, the contrast with Section 601 (d) is instructive, and shows that Congress knew how to draft a provision such as petitioners have in mind.[38]

2. Petitioners urge that a denial of the claim, because it should be presented under Title VII, is not "a determination under this section" (Br. 34).

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[38] Section 601 (d) provides:

"(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employee, or agent of the United States."

It is to be observed that the record does not show why the Commissioner denied the claim. But, in any event, a denial of a claim because it could not be presented under Section 601 is obviously a determination "with respect to any refund under this section", which "no court shall have jurisdiction to review".

3. Petitioners contrast the slightly more emphatic language of Section 906 (a), *infra*,[39] to show that Congress in Section 601 (e) did not really intend to oust the courts of jurisdiction. The two provisions, however, had a different legislative origin[40] and differences in language are to be expected. In any event, in Section 906 (a) Congress was taking cognizance of the many suits then outstanding for the recovery of processing taxes, and felt it necessary specifically to exclude pending cases.[41] No such problem was presented in Title IV.

4. Petitioners urge that their construction of Section 601 (e) is supported by some ten decisions

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[39] Section 906 (a) provides:

"Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. * * *"

[40] Title IV was in the Revenue Bill of 1936 (H. R. 12395) as it passed the House; Title VII passed the House a month later as a separate bill (H. R. 12793).

[41] The Senate Committee on Finance estimated their number as in excess of 200. S. Rep. No. 2156, p. 33.

construing similar statutes (Br. 35–37). None supports the assertion. In none was there involved a statute ousting the courts of jurisdiction, as does Section 601 (e).[42] Indeed, only two of the cases involved a statute which in terms made the administrative determination final; in each of these cases the Court, even in the absence of a statutory ouster of jurisdiction such as is founed in Section 601 (e), affirmed a judgment dismissing for want of jurisdiction.[43]

5. Petitioners advance a presumption that Congress has not intended to nullify existing rights (Br. 38). The remedies under Title VII, of course, are not a nullity. Even if they were, petitioners' presumption would at least be matched by other rules of construction: the doctrines that a clear consent is necessary to sue the United States and that doubts are to be resolved against one claiming a gratuity.

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[42] See, in addition to the cases cited in note 43, *Dismuke* v. *United States*, 297 U. S. 167; *United States* v. *Laughlin*, 249 U. S. 440; *Medbury* v. *United States*, 173 U. S. 492; *McLean* v. *United States*, 226 U. S. 374; *United States* v. *MacVeagh*, 214 U. S. 124; *United States* v. *Hvoslef*, 237 U. S. 1; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329; *United States* v. *Compagnie Generale Transatlantique*, 26 F. (2d) 195 (C. C. A. 2d).

[43] *United States* v. *Williams*, 278 U. S. 255; *Silberschein* v. *United States*, 266 U. S. 221. Petitioner relies on these cases solely because of a suggestion advanced in dictum that the administrative determination was final "*at least* unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious." (278 U. S. at 257–258; see 266 U. S. at 225; italics added.)

6. Finally, petitioners urge that our construction is contrary to the policy of Congress, as shown by Title VII, to allow taxpayers judicial review (Br. 38–39). In making this argument they reverse their former contention that they claim not as taxpayers but as exporters (see Br. 25–26). The statute, of course, evidences a clear policy to place refunds to taxpayers under Title VII, and gratuitous payments to others under Title IV [44] (*supra*, pp. 9–11). If petitioners should somehow succeed in having themselves placed in Title IV, they cannot at the same time urge that their remedies are to be construed as though they were taxpayers claiming under Title VII.

We submit, therefore, that even if petitioners could somehow present their claims under Section 17 (a) or Section 601, the court below would still be without jurisdiction.

CONCLUSION

For these reasons, we respectfully submit that the Court of Claims was without jurisdiction to en-

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[44] Congress felt justified in excluding judicial review under Title IV because the refunds were being authorized "to persons other than those who paid or were liable for payment of the tax" and because of the doubts as to the legal status of the claims after *United States* v. *Butler*, 297 U. S. 1. H. Rep. No. 2475, p. 14.

tertain these suits, and its judgment should be affirmed.

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APPENDIX

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by Secs. 12 and 13 of the Act of May 9, 1934, c. 263, 48 Stat. 670, and by Section 28 of the Act of August 24, 1935, c. 641, 49 Stat. 750:

> SEC. 17 (a). Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. In the case of rice, a tax due under this title which has been paid by a tax-payment warrant shall be deemed for the purposes of this subsection to have been paid; and with respect to any refund authorized under this section, the amount scheduled by the Commissioner of Internal Revenue for refunding shall be paid, any provision of law notwithstanding. In the case of sugar beets and sugarcane, this subsection shall be applicable to exports

of products thereof to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam only if this title with respect to sugar beets and sugarcane is not made applicable thereto. The term "product" includes any product exported as merchandise, or as a container for merchandise, or otherwise.

(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or partly therefrom. (U. S. C., Title 7, sec. 617.)

SEC. 21 (d) (1). No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or

passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE IV.—EXPORT, CHARITABLE, ETC., REFUNDS AND FLOOR STOCKS ADJUSTMENT UNDER AGRICULTURAL ADJUSTMENT ACT

SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

(a) The provisions of sections 10 (d), 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)), took place prior to January 6, 1936.

(b) Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this sec-

tion shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. No refund under this section shall be allowable to any person with respect to any articles where such person prior to January 6, 1936, paid an amount as tax under the Agricultural Adjustment Act, as amended, by taking as a credit against such amount an amount otherwise allowable as a refund with respect to such articles under sections 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), or 17 (a) of said Act. No refund under this section shall be allowed to any person except to the extent that he establishes that he has not received, and is not entitled to receive, reimbursement of such amount from the processor or other vendor with respect to the articles on which the claim is based. No claim under this section (except claims of processors under section 15 (a)) shall be disallowed on the ground that the tax with respect to the article or the commodity from which processed has not been paid.

(c) No refund under this section shall be made unless the claimant files a claim therefor prior to January 1, 1937, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and no claim shall be allowed in an amount less than $10. Sections 16 (g) and 21 (f) of the Agricultural Adjustment Act, as amended, are repealed.

(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any ad-

ministrative or accounting officer, employee, or agent of the United States.

(e) The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

(f) No interest shall be allowed in connection with any refund made under this section.

(g) Section 16 (e) (1) of the Agricultural Adjustment Act, as reenacted by subsection (a) of this section, is amended by striking out "subsequent to June 26, 1934" and by inserting in lieu thereof "on or after June 1, 1934". (U. S. C., Supp. V, Title 7, Sec. 641.)

SEC. 602. FLOOR STOCKS AS OF JANUARY 6, 1936.

(a) There shall be paid to any person who, at the first moment of January 6, 1936, held for sale or other disposition (including manufacturing or further processing) any article processed wholly or in chief value from a commodity subject to processing tax, an amount computed as provided in subsection (b), except that no such payment shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

(b) The amount of the payment under subsection (a) shall be equal to the processing tax which would have been payable with respect to the commodity from which the article was processed, if it had been processed on January 5, 1936, but not in excess of (1) the amount of the burden of the tax with respect to the article which was shifted to the claimant in the price he paid

for the article (to the extent that the claimant has not received and is not entitled to receive reimbursement for such burden from the processor or other vendor) and not in excess of (2) the amount of that part of the burden of the tax applicable to the articles held on January 6, 1936, which the claimant has not passed on to his vendees and has not included in the sale price of such articles. (U. S. C., Supp. V, Title 7, Sec. 642.)

* * * * *

(h) In the absence of fraud the findings of fact and the decision of the Commissioner upon the merits of any claim under this section, and the mathematical calculation therein shall not be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

(i) The determination of the Commissioner with respect to any payment under this section shall be final and no court shall have jurisdiction to review such determination.

(j) No interest shall be allowed in connection with any payment made under this section.

* * * * *

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (U. S. C. Supp. V, Title 7, Sec. 623 note.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any

claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(U. S. C. Supp. V, Title 7, Sec. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claims shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (As amended by Sec. 405 of the Revenue Act of 1939, c. 247, 53 Stat. 862; U. S. C., Supp. V, Title 7, Sec. 645.)

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the

Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases. (U. S. C., Supp. V, Title 7, Sec. 647).

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed,

unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * *

* * * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. * * *

(U. S. C. Supp. V, Title 7, Sec. 648.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence

that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) Period Before And After The Tax.—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) Average Margin.—The average margin for each period shall be ascertained in the same manner as monthly margins under

subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed during such period.

* * * * *

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. * * *

* * * * *

(U. S. C. Supp. V, Title 7, Sec. 649.)

SEC. 911. INAPPLICABILITY TO CERTAIN REFUNDS.

The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person. (U. S. C. Supp. V, Title 7, Sec. 653.)

* * * * *

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid

or collected a tax with respect to the processing of a commodity for a customer for a charge or fee.

* * * * *

(U. S. C. Supp. V, Title 7, Sec. 655.)

A. A. A. Refund Regulations Relating to Refunds on Exports, Deliveries for Charitable Distribution or Use (T. D. 4671, XV–2 Cum. Bull. 424):

ARTICLE 1. *General provisions applicable to claims.*—The following general provisions are applicable with respect to claims for refund under these regulations:

(a) Claims for refund will be allowed only in cases where the delivery for charitable distribution or use, the exportation, the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)) took place prior to January 6, 1936.

(b) No refund (except refunds under section 15 (a) of the Agricultural Adjustment Act) will be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. "Processor or other person who paid or was liable for the tax" means any person, who, under the Agricultural Adjustment Act, as amended, paid, or incurred liability for but did not pay, processing tax with respect to the commodity from which the article was made, or floor stocks tax or compensating tax with respect to the article or the material from which the article was made.

(c) No refund will be made to any person with respect to any article included in a claim under these regulations, if such person, prior to January 6, 1936, paid an amount as tax under the Agricultural Ad-

justment Act, as amended, by taking as a credit against such amount, an amount otherwise allowable as a refund with respect to such article. Credit includes any amount, otherwise allowable as a refund under sections 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), or 17 (a) of the Agricultural Adjustment Act, as amended, which was deducted from an amount due as tax under that Act.

(d) Every person who files a claim under these regulations shall submit with the claim, proof satisfactory to the Commissioner that with respect to the amount claimed he has not received, and is not entitled to receive, reimbursement of such amount, or any part thereof, from the processor of the commodity from which the articles were derived, or other vendor with respect to the articles on which the claim is based.

If any claimant has entered into an agreement, whether oral or written, with the processor or other vendor of such articles, under the provisions of which the claimant has received, or is entitled to receive reimbursement of all or any part of the tax with respect to such articles, then the amount of refund allowable is limited to the amount with respect to which he is not so entitled to reimbursement.

(e) (1) No claim (except claims of processors under section 15 (a) of the Agricultural Adjustment Act) will be disallowed on the ground that the tax with respect to the article on which the claim is based (or the commodity from which such article was processed) has not been paid.

(2) Each claim shall show, with respect to the articles on which the claim is based, that the claimant is not the processor or

other person who paid or was liable for the tax, except that in the case of claims of processors under section 15 (a) of the Agricultural Adjustment Act, the claim shall show (1) the name and address of the person who paid the tax, (2) the kind of tax paid, (3) if processing tax was paid, the month and year of such processing, (4) the date of payment, and (5) the internal-revenue district in which paid.

(f) No claim for refund will be allowed unless such claim shall have been filed by the person entitled thereto prior to January 1, 1937, and no refund will be allowed in an amount less than $10.

(g) No interest will be allowed in connection with any refund allowed pursuant to section 601 of the Revenue Act of 1936.

* * * * *

ART. 6. *Refunds under section 17 (a) of the Agricultural Adjustment Act, as amended, with respect to articles exported.*—(a) The provisions of Regulations 83 (September, 1934, Edition), insofar as not consistent with Article 1 of these regulations, are hereby made applicable in cases of claims for refund with respect to products exported.

(b) Article 3 (a) of Regulations 83 (September, 1934, Edition), is hereby amended to read as follows:

"ART. 3. *Claim for refund.*—(a) (1) *Who may file claim.*—

"A. The *consignor* named in the bill of lading under which the product is exported shall be entitled to make claim for refund unless he shall have waived such right to the shipper. *Consignor named in the bill of lading* means the person named in the bill

of lading as the person from whom the carrier received the product for shipment.

"B. The *shipper,* if other than the consignor named in the bill of lading, shall be entitled to make claim for the refund only if the consignor shall have waived any claim to such refund to him. In such case, the term *shipper* means the person for whom the consignor named in the bill of lading is handling the product for shipment.

"C. Where the product was not exported under a bill of lading, the person who owned the product at the time of exportation shall be entitled to make claim for refund, and a waiver may not be used.

"D. No refund will be made to the processor or other person who paid or was liable for the tax with respect to the products exported.

"(2) The claim for refund shall be executed by the claimant on the prescribed form, P. T. Form 27, revised, in accordance with the instructions contained thereon, and in accordance with these regulations. The claim must be filed with the collector for the district in which is located the principal place of business of the claimant. If the claimant has no principal place of business in the United States, the claim must be filed with the collector at Baltimore, Md. One claim may cover a number of export shipments."

Treasury Regulations 96, relating to Claims for Refund in Title VII of the Revenue Act of 1936:

ART. 302. Limitation as to number of claims.—Only one claim shall be filed by any

person for refund of floor stocks taxes. The claimant shall include in such claim the total amount of refund claimed with respect to the total amount of all floorstocks taxes paid by him.

If the claimant paid floorstocks tax with respect to more than one commodity, the total amount of refund claimed out of the total floorstocks taxes paid with respect to all commodities shall, nevertheless, be set forth in one claim. For example, if the claimant paid the cotton floorstocks tax, the wheat floorstocks tax, and the tobacco floorstocks tax, he shall include in one claim the total amount of the refund sought out of the total amount of floorstocks taxes paid by him with respect to cotton articles, wheat articles, and tobacco articles, and shall not file three separate claims.

* * * * *

ART. 402. Limitation as to number of claims.—Separate claims shall be filed with respect to the compensating tax paid on articles imported through each customs port of entry, and importations made through one customs port of entry shall not be included in the same claim with importations made through another customs port of entry. The claimant may include in a single claim compensating tax paid with respect to a number or all of the importations he has made through the same customs port of entry.

* * * * *

ART. 502. Limitation as to number of claims.—A separate claim shall be filed with respect to each commodity processed. Only one claim shall be filed by any person with

respect to the total amount paid by such person as "custom processing tax" on the processing of a single commodity.

* * * * *

ART. 602. Limitation as to number of claims.—A separate claim shall be filed with respect to each commodity on the processing of which the claimant paid processing tax. In the case of tobacco, all market classifications of tobacco shall be considered a single commodity and, therefore, there shall be included in one claim all of the market classifications of tobacco on the processing of which the claimant paid processing tax. Only one claim shall be filed by any person with respect to the total amount paid by such person as processing tax on the processing of a single commodity (or of all market classifications of tobacco).

U. S. GOVERNMENT PRINTING OFFICE: 1940

SUPREME COURT OF THE UNITED STATES.

Nos. 23, 24, 25.—October Term, 1940.

23	Wilson & Co., Inc., Petitioner, *vs.* United States, Respondent.	On Writs of Certiorari to the United States Court of Claims.
24	Wilson & Co., Inc., of Kansas, Petitioner, *vs.* United States, Respondent.	
25	T. M. Sinclair & Co., Ltd., Petitioner, *vs.* United States, Respondent.	

[November 18, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioners are corporations engaged in the preparation, packing, and sale of meat products in foreign and domestic commerce. Between November 5, 1933 and January 6, 1936 they exported to foreign countries large quantities of hog products with respect to which they paid processing taxes under Section 9(a) and floor stock taxes under Section 16(a) of the Agricultural Adjustment Act. 48 Stat. 31, 35, 40. Subsequent to exportation petitioners filed claims for refunds under Section 17(a). 48 Stat. 31, 40. The Commissioner of Internal Revenue denied all of the claims and suit in the Court of Claims followed. The United States thereupon moved to dismiss the petitions on the ground that the Court of Claims was without jurisdiction because of certain provisions of Title VII of the Revenue Act of 1936. 49 Stat. 1648, 1747-1755. The Court of Claims dismissed the actions for want of jurisdiction, on the ground, however, that Section 601(e) of Title IV of the Revenue Act of 1936, 49 Stat. 1648, 1740, prevented judicial review of the Commissioner's action. 30 F. Supp. 672. To resolve the conflict with *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) 937, and *Neuss, Hesslein & Co., Inc.* v. *United States*, 30 F. Supp. 595, we granted certiorari. 309 U. S. 651.

The single question presented is whether the Court of Claims was without jurisdiction of petitioners' suits. We hold that it was.

Title VII conditions payment of refunds upon proof that the claimant actually bore the burden of the tax sought to be refunded or that he unconditionally repaid it to his vendee who bore the burden. Since petitioners do not allege satisfaction of these conditions it is plain that they do not claim under Title VII. Indeed, they disown any attempt to bring their claims within its provisions.

Title IV provides for refunds to exporters of products upon which processing or floor stock taxes have been paid. It is true that Section 17(a) of the Agricultural Adjustment Act provided for these refunds before the Act was held unconstitutional in *United States* v. *Butler,* 297 U. S. 1. Whether petitioners could still establish refund claims under that section if the act had never been invalidated is a question we need not consider. For whatever the effect of that decision on Section 17(a), Congress expressly made it a part of Title IV by reenacting it in Section 601(a). 49 Stat. 1648, 1739.[1] It follows that petitioners' claims, purportedly based on Section 17(a), must be governed by Title IV and the limitations it imposes.

Section 601(e) of Title IV provides:

"The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination."

Petitioners contend that Congress intended to commit to the final determination of the Commissioner only "such matters as findings of fact, computations, and the like". Quite apart from the fact that in Section 601(d)[2] Congress uses virtually the quoted words in limiting review by administrative officers, we fail to see how the argument can aid petitioners here because the record does not show why their claims were denied. Since the record is silent on this point, such decisions as *United States* v. *Williams,* 278 U. S.

[1] Sec. 601. (a) The provisions of sections . . . 17(a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where . . . the exportation . . . took place prior to January 6, 1936.

[2] Sec. 601. (d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employee, or agent of the United States.